***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

520

# BRIEF FOR THE RAILROAD APPELLEES

IN THE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 22,050**

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Appellant*,

*v.*

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., *Appellees.*

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**No. 22,185**

NATIONAL MEDIATION BOARD, *Appellant*,

*v.*

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL., *Appellees.*

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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## BRIEF FOR THE RAILROAD APPELLEES

This litigation arose out of what commonly is referred to as a "jurisdictional" dispute between two unions. The railroads, including those named as defendants in the complaint and included among the appellees here (hereafter called the "carriers" unless referred to individually), are caught in the middle of that dispute. The appellant Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), as representative of the craft of locomotive

firemen, has served each of the carriers (and many other railroads) with a notice under Section 6 of the Railway Labor Act (45 U.S.C. § 156) proposing the establishment of a program for hiring and training apprentices who would qualify and receive seniority rights as locomotive engineers upon successful completion of the training program. The appellee Brotherhood of Locomotive Engineers ("BLE") has asserted that such apprentices come within the craft of locomotive engineers, which it represents, and that the BLF&E, Section 6 notice constitutes an unlawful encroachment upon the BLE's jurisdiction. The BLF&E threatens to strike the carriers if they do not bargain and agree with the BLF&E; the BLE threatens to strike the carriers if they do bargain or agree with the BLF&E.

The carriers have refused to bargain with the BLF&E over the merits of its Section 6 notice, unless and until a determination is made by some appropriate authority that the BLF&E has jurisdiction of the apprentices so as to be entitled to serve and bargain about such notice. The appellant National Mediation Board ("NMB") has refused to investigate and decide the jurisdictional dispute between the two unions under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth). The District Court, by Judge Sirica, ordered the NMB to investigate and determine that dispute, declared that the carriers are not required to bargain with the BLF&E over its Section 6 notice unless and until the NMB determines that the BLF&E is the representative of apprentices training to become locomotive engineers, and enjoined the BLF&E from striking the carriers over that notice unless and until such a determination is made and the procedures of the Railway Labor Act are otherwise exhausted.

## Questions Presented

1. Whether the carriers may be required to bargain with the BLF&E over the aforesaid Section 6 notice unless and until the jurisdictional dispute between the BLE and the BLF&E is resolved by a determination that the BLF&E has jurisdiction to represent the apprentices who would be subject to the rates of pay, rules and working conditions proposed in the Section 6 notice?

2. Whether the NMB has the duty to decide the jurisdictional dispute between the two unions and, if so, whether it may be required by the Court to perform that duty?

The Section 6 notice served by the BLF&E was involved in the decision by this Court reported as *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, — U.S. App. D.C. —, 385 F.2d 581 (1967). As this Court noted (385 F.2d, at 600), however, the issues involved here were excluded from that litigation by stipulation of the parties thereto.

## Statement of the Case

Judge Sirica made comprehensive findings of fact that clearly summarize the factual underpinning of the legal issues before the Court. Neither the BLF&E nor the NMB has requested this Court to set aside any of those findings as clearly erroneous (see Rule 52(a) F.R. Civ. P.), and neither appellant contends that there is a genuine dispute as to the facts so found sufficient to make the summary judgment entered below improper even if Judge Sirica was correct in his conclusions of law (see Rule 56(c) F.R. Civ. P.). In these circumstances, we believe that this Court most appropriately may look to Judge Sirica's findings of fact for a Statement of the Case. While those findings are set forth in the Joint Appendix (pp. 327-337) and are reported at 284 F. Supp. 344, we reprint them here for the conven-

ience of the Court, as follows (Findings 1-3, which identify the parties, are omitted):

4. In the railroad industry, the representation of employees by labor organizations is and for many years has been on the basis of crafts or classes of employees.

5. There are and for many years have been two crafts or classes of engine service employees, that is, employees whose basic duties are confined to service in the cabs of locomotives: locomotive engineers and locomotive firemen.

6. The BLE is and for many years has been the duly designated and authorized representative of the craft or class of locomotive engineers on each of the carrier defendants and on most of the other railroads in the United States. On each carrier where that is true, it is undisputed that under the Railway Labor Act the BLE is the exclusive representative of all of the carrier's employees within the craft or class of locomotive engineers and is the only organization authorized to serve upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of proposals to change the rates of pay, rules, or working conditions applicable to the craft or class of locomotive engineers, to confer, negotiate, or bargain with the carrier about such proposals, and to enter into agreements with the carrier about the rates of pay, rules, and working conditions applicable to the craft or class of locomotive engineers.

7. The BLF&E is and for many years has been the duly designated and authorized representative of the craft or class of locomotive firemen on each of the carrier defendants and on most of the other railroads in the United States. On each carrier where that is true, it is undisputed that under the Railway Labor Act the BLF&E is the exclusive representative of all of the carrier's employees within the craft or class of locomotive firemen and is the only organization authorized to serve upon the carrier under Section 6 of the Railway Labor Act (45 U.S.C. § 156) notices of

proposals to change the rates of pay, rules, or working conditions applicable to the craft or class of locomotive firemen, to confer, negotiate, or bargain with the carrier about such proposals, and to enter into agreements with the carrier about the rates of pay, rules, and working conditions applicable to the craft or class of locomotive firemen.

8. There is no existing separate craft or class of employees, for purposes of the Railway Labor Act, designated or known as "engine service employees" or "locomotive enginemen." The term "engine service employees" is commonly understood in the railroad industry to refer to both locomotive engineers and locomotive firemen.

9. Locomotive engineers generally are needed and used on all locomotives operated by a carrier. Prior to the effectuation of the Award by Arbitration Board No. 282, agreements between the carriers and the BLF&E generally required that a locomotive fireman be used on each locomotive operated by a carrier. That Award, which was issued on November 26, 1963, pursuant to Public Law 88-108 (77 Stat. 132), generally authorized the carriers to eliminate up to ninety percent of locomotive firemen positions on locomotives in freight and yard service.

10. For many years, the carriers' needs for additional locomotive engineers had been met primarily, although not exclusively, by the promotion of qualified locomotive firemen to the craft or class of locomotive engineers. When a locomotive engineer is no longer needed as such, because of fluctuations in the carrier's business or other reasons, he may be demoted, according to his seniority, to the craft or class of locomotive firemen. The collective bargaining agreements between each carrier and the BLE and the collective bargaining agreements between that carrier and the BLF&E contain substantially identical provisions concerning the promotion of qualified locomotive firemen to locomotive engineers and the demotion of unneeded locomotive

engineers to locomotive firemen. Those provisions were adopted by the Director General of Railroads in 1919, when the railroads were being operated by the Federal Government, and have been retained, with some modifications, ever since. They do not specify the training required before a locomotive fireman may be qualified for promotion to locomotive engineer or a locomotive engineer may be hired by a carrier.

11. A locomotive fireman who has been promoted to the craft or class of locomotive engineers thereafter is represented by the BLE (except on those few railroads on which the craft or class of locomotive engineers is represented by the BLF&E) for as long as he remains a member of that craft or class; he is no longer represented by the BLF&E; and the rates of pay, rules, and working conditions established by the carrier with the BLE, rather than the rates of pay, rules, and working conditions established by the carrier with the BLF&E, are applicable to such individual. When a locomotive engineer has been demoted to the craft or class of locomotive fireman, thereafter he is represented by the BLF&E (except on those few railroads on which locomotive firemen are represented by the BLE) for as long as he remains a member of that craft or class; he is no longer represented by the BLE; and the rates of pay, rules, and working conditions established by the carrier with the BLF&E, rather than the rates of pay, rules and working conditions established by the carrier with the BLE, are applicable to such individual.

12. Prior to the effectuation of the Award by Arbitration Board No. 282 (Finding of Fact 9, above), the needs of the carriers for additional locomotive engineers generally could be fully satisfied through the promotion of qualified locomotive firemen and the hiring of persons otherwise qualified to become locomotive engineers. There was no necessity for a program to train apprentices to

become locomotive engineers, and none of the carriers had such a program. As the number of locomotive firemen employed by the carriers, and thus the number of locomotive firemen qualified for promotion to locomotive engineers, has been reduced following effectuation of the Award by Arbitration Board No. 282, the defendant Louisville & Nashville Railroad Company has found it necessary to provide an additional source for obtaining locomotive engineers. Other carrier defendants and other railroads foresee a similar need within the near future.

13. In order to meet its needs for locomotive engineers, the defendant Louisville & Nashville Railroad Company determined it to be necessary, in April 1966, to establish a program for the training of apprentices to become locomotive engineers. On April 28, 1966, that carrier and the BLE entered into an agreement establishing the rate of pay applicable to such apprentices. While the Louisville & Nashville continues to promote qualified and available locomotive firemen to positions as locomotive engineers, part of its need for additional locomotive engineers is now being met by hiring apprentices who have successfully completed the apprentice training program and qualified to become locomotive engineers. The BLE has been recognized by the Louisville & Nashville as the designated and authorized bargaining representative of the apprentices, and the BLF&E has not applied to the NMB for an investigation to determine whether someone other than the BLE should be certified as the designated and authorized representative of such apprentices.

14. The defendant Great Northern Railway Company and the BLE entered into an agreement concerning the future training of apprentices to become locomotive engineers on September 13, 1967. Apart from the Louisville & Nashville and the Great Northern, none of the carrier defendants has yet established a program for training appren-

tices to become locomotive engineers. In some instances, the establishment of such a program has been delayed by the dispute between the BLE and the BLF&E as to which organization is entitled to represent apprentices training to become locomotive engineers, but some of the carrier defendants and other railroads believe that the establishment of such an apprentice training program within the relatively near future will be essential in order to assure them of an adequate supply of qualified locomotive engineers.

15. On or about March 25, 1965, the BLF&E served upon the defendant Louisville & Nashville Railroad Company a notice, purportedly pursuant to Section 6 of the Railway Labor Act (45 U.S.C. § 156), which proposed the establishment of an apprentice training program. On or about April 28, 1965, the BLF&E served upon the defendant Southern Pacific Company a notice, purportedly pursuant to Section 6 of the Railway Labor Act, which proposed the establishment of an apprentice training program. On or about November 15, 1965, the BLF&E served upon each of the carrier defendants except the Louisville & Nashville Railroad Company and upon more than 100 other railroads throughout the United States a notice, purportedly pursuant to Section 6 of the Railway Labor Act; this notice consisted of three parts identified as "Notice No. 1," "Notice No. 2," and "Notice No. 3"; the part designated as "Notice No. 3" proposed the establishment of an apprentice training program. "Notice No. 3" and the notices served upon the Louisville & Nashville and the Southern Pacific, described above, are hereinafter called the "apprentice notices."

16. In its apprentice notices, the BLF&E proposed to require the carriers to establish a program for the training of apprentices who, upon successful completion of the program, would become qualified and receive seniority as

locomotive engineers, and those notices otherwise relate to the training of apprentices to become locomotive engineers.

17. In correspondence with the carriers shortly after the BLF&E's apprentice notices had been served, the BLE claimed that those notices encroached upon its jurisdiction as the representative of the craft or class of locomotive engineers and that the carriers could not lawfully bargain or agree with the BLF&E upon the apprentice training program proposed in those notices. The BLE has since consistently maintained that position before the NMB and in this Court, as well as otherwise, and threatens to strike and engage in other self-help against any carrier that confers, negotiates, or otherwise agrees with the BLF&E upon the merits of its apprentice notices.

18. In correspondence with the carriers and the NMB and before this Court, the BLF&E has claimed and it now claims that its apprentice notices come within its jurisdiction as the representative of the craft or class of locomotive firemen and that the carrier defendants and the other carriers served with the said notices are required by the Railway Labor Act to confer, negotiate, and otherwise bargain with the BLF&E about the merits of the proposals made therein. There is substantial likelihood that the BLF&E, if not restrained by the court, will engage in strikes or other self-help against the carriers with respect to those proposals if the procedures of the Railway Labor Act are exhausted without an agreement being reached between the said carriers and the BLF&E.

19. Since the BLF&E's apprentice notices were served on the carriers, there has existed, and there now exists, a dispute between the BLF&E and the BLE as to whether apprentices being trained to become locomotive engineers are a part of the craft or class of locomotive firemen.

20. A strike by either the BLE or the BLF&E against any of the carrier defendants would cause grave and irre-

parable injury to the carrier and would disrupt essential transportation services in interstate commerce.

21. The carrier defendants and the other carriers served with the BLF&E's apprentice notices have expressed their willingness to bargain with the duly designated and authorized representative of apprentices training to become locomotive engineers regarding any valid and bargainable proposal with respect to the rates of pay, rules, or working conditions applicable to such apprentices. The carriers have objected to the BLF&E's apprentice notices, however, on the ground that those notices are invalid and nonbargainable under the Railway Labor Act because they are not within the jurisdiction of the BLF&E as the representative of the craft or class of locomotive firemen. The carriers have contended that they are not required to bargain or agree with the BLF&E with respect to the BLF&E's apprentice notices unless and until it has been definitely determined that the BLF&E is the designated and authorized representative of apprentices training to become locomotive engineers. Consequently, the carriers have refused to bargain with the BLF&E upon the merits of the BLF&E's apprentice notices. At various times, the BLF&E has applied to the NMB for its mediation services with respect to the apprentice notices served upon the carrier defendants and some of the other carriers, but no mediation upon the merits of the notices has occurred. The BLF&E has requested the NMB to terminate its services with respect to such notices, but the NMB has not done so.

22. On or about June 6, 1966, the representative of the carrier defendants and the other carriers that had been served with the BLF&E apprentice notices informed the NMB of the dispute between the BLF&E and the BLE arising out of the BLF&E's apprentice notices and requested mediatory services of the NMB in order that the carriers might "be properly and legally informed as to

which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." On or about June 21, 1966, and NMB dismissed this application on the ground that the question as posed "involved a question of representation" and that "[s]uch issues are resolved under Section 2, Ninth, of the Railway Labor Act." On or about June 29, 1966, counsel for the carriers requested a hearing for the purpose of securing clarification of the grounds for dismissal. This request was denied by the NMB on June [*sic*; July] 22, 1966.

23. On or about June 25, 1966, the BLF&E filed a complaint against the defendant Louisville & Nashville Railroad Company in the United States District Court for the Western District of Kentucky (Civil Action No. 5402). In that complaint, the BLF&E sought to restrain the Louisville & Nashville from effectuating and implementing the agreement of April 28, 1966, between the Louisville & Nashville and the BLE (Finding of Fact 13, above). On or about July 5, 1966, the court dismissed that action after concluding that the "action involves a controversy between BLF&E and BLE . . . as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this Court has no jurisdiction to determine that controversy, the determination of which is exclusively within the jurisdiction of the National Mediation Board." An appeal by the BLF&E is now pending in the United States Court of Appeals for the Sixth Circuit (No. 17,588).[1]

24. On or about June 30, 1966, and July 5, 1966, the BLE informed the NMB of the BLF&E's challenge to its right

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[1] The Sixth Circuit subsequently affirmed on the ground that "Jurisdictional disputes between labor organizations governed by the Railway Labor Act are within the exclusive jurisdiction of the National Mediation Board." *Brotherhood of Locomotive Fire. & E.* v. *Louisville & N. R. Co.*, 400 F.2d 572 (6th Cir., 1968). See pp. 54-56, *infra*.

to represent appentice locomotive engineers employed by the Louisville & Nashville and requested the NMB's services pursuant to Section 2 Ninth of the Railway Labor Act. On July 22, 1966, the NMB dismissed this application on the ground that its authority under Section 2 Ninth does not extend to a "jurisdictional dispute as such," and that "the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes."

25. On or about July 22, 1966, the NMB, acting upon the mediation cases involving the BLF&E's apprentice notices served upon the defendants Louisville & Nashville Railroad Company and Southern Pacific Company, notified the BLF&E and the carriers' representative that, because of the denial of the carriers' request for a hearing with respect to the dismissal of the carriers' application dated June 6, 1966 (Finding of Fact 22, above), the BLF&E and the carriers "should now enter into discussion concerning the Section 6 notices served by the BLF&E. . . ." Accordingly, the NMB announced that mediation conferences with respect to the apprentice notices served by the BLF&E upon those two carriers would be held on August 4, 1966.

26. On July 27, 1966, the BLE, stating its contention that the BLF&E's apprentice notice as served on the defendant Southern Pacific Company infringed on the BLE's right to represent apprentice locomotive engineers, applied for the NMB's services under Section 2 Ninth of the Railway Labor Act to determine which organization does represent apprentice locomotive engineers on the Southern Pacific for purposes of the Railway Labor Act, in order that the BLE might know whether that carrier could properly and

legally bargain with the BLF&E concerning the apprentice notice. On July 28, 1966, the BLE requested the NMB to reconsider its dismissal of the BLE's Section 2 Ninth application with respect to the right to represent apprentice locomotive engineers on the Louisville & Nashville (Finding of Fact 24, above), and to advise the BLE as to the nature of the "[p]rocedures other than those outlined in Section 2 Ninth" which the NMB had stated, in dismissing that application, "are available" to settle the dispute between the BLE and the BLF&E (Finding of Fact 24, above). The NMB did not reply to either the July 27, 1966 [application as to the situation on the Southern Pacific or the July 28, 1968] [2] request with respect to the situation on the Louisville & Nashville except that the NMB notified the BLE, on or about August 1, 1966, that mediation conferences would be held as scheduled on August 4, 1966.

27. On August 4, 1966, representatives of the NMB met separately with representatives of the BLF&E and representatives of the carriers, but the merits of the BLF&E's apprentice notices were not discussed. No further mediation with respect to those notices has been scheduled.

## Statutes Involved

The relevant statutory provisions are set forth in the Appendix hereto.

## Summary of Argument

I. The "obligation imposed on the employer" by the Railway Labor Act "to treat with the true representative of the employees as designated by the Mediation Board . . . is exclusive." The Act "imposes the affirmative duty to treat only with the true representative, and hence the nega-

[2] It seems plain from the context that the bracketed language or language having similar import was inadvertently omitted from the findings.

tive duty to treat with no other." *Virginian Ry.* v. *Federation*, 300 U.S. 515, 548 (1937). That holding in the *Virginian Railway* case has been followed by the courts ever since, and conforms with both the language and purpose of the statute. Hence, the carriers may not lawfully bargain with the BLF&E over its Section 6 notices proposing to establish the rates of pay, rules and working conditions of apprentices training to become locomotive engineers, if the apprentices come within the craft of locomotive engineers so as to be represented by the BLE, as that union contends. *Ruby* v. *American Airlines, Inc.*, 329 F.2d 11 (2d Cir., 1964). This being so, the carriers may not be required to bargain with the BLF&E over those Section 6 notices unless and until an authoritative determination is made that the BLF&E is the true representative of the apprentices. *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 255 (2d Cir., 1963).

None of the carriers employed engine-crew apprentices when the BLF&E's Section 6 notices were served. If apprentices must be employed before the jurisdictional dispute between the BLE and the BLF&E can be determined by the NMB under Section 2 Ninth of the Act, as the NMB contends, then apprentices must be employed before a valid notice can be served on their behalf under Section 6 of that Act. Section 6 notices must be served by the representative of the "employees" whose rates of pay, rules and working conditions would be effected, just as Section 2 Ninth disputes as to who that representative is must arise among "employees." Under this interpretation of the Act, therefore, the BLF&E's Section 6 notices are clearly invalid and nonbargainable.

The contention by the BLF&E (but not by the NMB) that the action of the NMB in docketing certain of the BLF&E's Section 6 notices for mediation constituted an adjudication that those notices are valid and bargainable, and that that adjudication cannot be reviewed by the courts, cannot be

supported. Unlike its functions under Section 2 Ninth, the NMB's mediation functions under Section 5 of the Act are not adjudicatory in nature. The NMB itself has made clear that it does not decide the validity or bargainability of a Section 6 notice, when it dockets such a notice for mediation. The NMB dismissed a request by the carriers that it decide the dispute between the BLE and the BLF&E as to which union has jurisdiction to represent the apprentices, through an exercise of its mediatory authority under Section 5, on the ground that such disputes may only be decided under Section 2 Ninth. Thus, the courts have frequently assumed jurisdiction to decide the validity or bargainability of Section 6 notices that had been docketed by the NMB for mediation, without giving any apparent weight to that fact. In *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, — U.S. App. D.C. —, 385 F.2d 581, 594-604 (1967), this Court decided an issue as to the prematurity of the very Section 6 notices involved here and issues as to the validity and bargainability of two other Section 6 notices served at the same time by the BLF&E. That decision, among others, also demonstrates that there is no substance in the BLF&E's contention that the court below should not have decided whether the carriers have a duty to bargain with the BLF&E until such bargaining has been had.

II. There undoubtedly is a dispute between the BLE and the BLF&E as to which union has jurisdiction to represent apprentices training to become locomotive engineers. The Section 6 notices served by the BLF&E proposed to establish a program whereby apprentices would be trained to become engineers, and the BLE immediately notified the carriers that those notices encroached upon its jurisdiction as representative of the craft of locomotive engineers, so that the carriers could not legally bargain with the BLF&E in that regard. The two unions have been vigorously disputing this issue ever since. Their actions in that regard

include not only this litigation, but also a suit brought by the BLF&E in the Western District of Kentucky to invalidate an apprentice agreement entered into by the Louisville & Nashville Railroad Company with the BLE. Moreover, the dispute concerns jurisdiction to represent a particular group of employees—the apprentices—and is not a "work assignment" dispute (where each union claims that its contract with the carrier covers the same work) within the jurisdiction of the National Railroad Adjustment Board to decide, and the NMB appears to have abandoned its contrary suggestion made in dismissing the Section 2 Ninth application filed by the BLE.

The other ground stated at that time by the NMB for dismissing that application—that it "has no authority to decide a jurisdictional dispute as such"—also is without foundation. The United States Court of Appeals for the Sixth Circuit, in the case brought by the BLF&E in the Western District of Kentucky, already has concluded that the NMB has exclusive jurisdiction under Section 2 Ninth to decide the jurisdictional dispute which is now before this Court. *Brotherhood of Locomotive Fire. & Eng.* v. *Louisville & N.R. Co.*, 400 F.2d 572 (6th Cir., 1968). That decision, and the identical conclusion reached by Judge Sirica in this case, are compatible with the language of Section 6, are in furtherance of the general objectives of the Congress in enacting the Railway Labor Act, and are supported by legislative history relating specifically to the scope of Section 2 Ninth. The Supreme Court cited that legislative history in stating that Section 2 Ninth was designed "to resolve a wide range of jurisdictional disputes between unions or between groups of employees." *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336 (1943), in which the Court held that such disputes are not to be decided by the courts. Subsequent cases in the Supreme Court and in the lower courts confirm this reading of Section 2 Ninth.

The contention by the NMB that apprentices must be employed before a dispute cognizable under Section 2 Ninth can arise, even if otherwise valid, does not support its dismissal of the Section 2 Ninth application filed by the BLE with respect to the apprentices employed by the L&N. Unlike the situation when the BLF&E served its Section 6 notice, that carrier was employing apprentices when the Section 2 Ninth application was filed and continues to do so. The terms of the apprentice training program on that carrier (and also on the Great Northern), the "work" to be performed by the apprentices and all other pertinent details have been determined either by agreement with the BLE or by the exercise of managerial discretion in a manner which has not been challenged by the BLE.

The contention that the NMB may resolve jurisdictional disputes only in connection with designating the employees entitled to participate in an election under Section 2 Ninth is not supportable, in our opinion, but in any event there is no reason why the NMB may not hold an election if that is deemed to be a prerequisite to a determination of the dispute between the BLE and the BLF&E. Other contentions by the BLF&E or the NMB as to why the NMB should not determine that dispute, at least at this time, have even less merit.

## Argument

Representation of railroad employees for purposes of collective bargaining traditionally has been on a craft basis, and such craft representation has been recognized in and continued under the Railway Labor Act (JA 235, 238). "Freedom of choice in the selection of representatives on each side . . . is the essential foundation of the statutory scheme." *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U.S. 548, 569 (1930). Thus, the carriers are prohibited from interfering with, influencing or coercing their employees in the choice of a collective bargaining representative (45

U.S.C. §152 Third, Fourth and Fifth), and willful violations of that prohibition are criminal offenses (45 U.S.C. §152 Tenth). The union chosen by a majority of the employees in a particular craft is the exclusive bargaining representative of all of a carrier's employees in that craft (45 U.S.C. §152 Fourth, Ninth), and is the only union that may serve the carrier under Section 6 of the Act (45 U.S.C. §156) with notice of proposed changes in the "rates of pay, rules or working conditions" applicable to the members of that craft. Hence, the carrier may not lawfully bargain about such rates of pay, rules or working conditions with any other union or with the employees individually.

The dilemma with which the carriers here are faced is that the BLE contends that apprentices training to become locomotive engineers come within the craft of locomotive engineers, which it represents, while the BLF&E, which represents the craft of locomotive firemen, contend that such apprentices come within that craft. If the BLE is correct, it is the representative of the apprentices and the carriers cannot lawfully bargain with the BLF&E concerning their rates of pay, rules or working conditions; on the other hand, if the BLF&E is correct, the carriers cannot lawfully bargain with the BLE in that regard. The carriers' dilemma assumed concrete form when the BLF&E served them with Section 6 notices proposing to establish a program for training apprentices who, upon successful completion of the training program, would be qualified and obtain seniority rights as locomotive engineers. The BLF&E threatens to strike the carriers if they do not bargain and agree with the BLF&E upon that training program, and the BLE threatens to strike the carriers if they either bargain or agree with the BLF&E in that regard (JA 196, 259-260, 333).

The carriers are, therefore, caught in the middle of what the Supreme Court has denominated as a "jurisdictional

dispute—an asserted overlapping of the interests of two crafts."[3] *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 334 (1943). The Supreme Court also pointed out that such a dispute "necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority." *Id.*, at 334-335. The basic interest of the carriers is that that "determination" be made with respect to the present jurisdictional dispute between the BLE and the BLF&E so that the carriers may know with which union (if either) they may lawfully deal concerning the rates of pay, rules or working conditions of apprentices training to become locomotive engineers, and that the carriers not be compelled to deal with either union in that regard—with the attendant risk of violating the law and being struck by the other union —until that determination is authoritatively made.

In short, the carriers are willing to bargain with the BLE, the BLF&E or any other union concerning the rates of pay, rules or working conditions of apprentices training to become locomotive engineers, if that union has been authoritatively determined to be the representative of such apprentices under the Act (JA 262-263, 334). The carriers also do not particularly care *who* determines the jurisdictional dispute, as long as someone does so in an authoritative manner. The Supreme Court held in the *M.-K.-T.* case, however, that the courts were not authorized to determine such jurisdictional disputes, and indicated (although not then called upon to decide) that the determination should

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[3] For convenience, we follow the lead of the Supreme Court and use the term "jurisdictional dispute" to describe a situation, such as exists here, in which the problem is one of drawing craft lines rather than of determining which union is the choice of a majority of the craft when properly defined. The latter situation sometimes is referred to as a "representation dispute." We note, however, that the basic problem here is determining who represents the apprentices, and these terms sometimes are used interchangeably.

be made by the NMB. See pp. 60-62, *infra*. The problems now before this Court have arisen because the NMB, nevertheless, has refused to determine the jurisdictional dispute between the BLE and the BLF&E.

Both the court below in this case and the Sixth Circuit, in another case brought by the BLF&E and involving the identical jurisdictional dispute insofar as it relates to the Louisville & Nashville Railroad Company ("L&N"), have held that the NMB has the duty to decide that jurisdictional dispute between the two unions. The court below also held that the carriers cannot be required to bargain with the BLF&E about its proposed apprentice training program unless and until the NMB determines that the BLF&E is the representative of the apprentices for purposes of such collective bargaining. We shall demonstrate that Judge Sirica correctly decided both of those issues.

## I. The Carriers Are Not Required to Bargain About the BLF&E's Apprentice Notices Until It Is Established that the BLF&E Is the Representative of the Apprentices.

The authorized representative of a craft of employees on a carrier is the exclusive representative of all of the members of that craft in collective bargaining with the carrier, and the carrier cannot lawfully bargain with any other union concerning the rates of pay, rules or working conditions applicable to any member of that craft. Consequently, if apprentices training to become locomotive engineers are within the craft of locomotive engineers, as the BLE contends, the Section 6 notices served by the BLF&E upon the carriers are invalid, and neither the BLF&E nor the carriers can lawfully bargain or agree with respect thereto. This being so, the carriers cannot be compelled to bargain with the BLF&E over those notices, in the face of the juris-

dictional dispute raised by the BLE and in possible violation of the law, in the absence of an authoritative determination that the BLF&E in fact is the representative of the apprentices. Moreover, if it is necessary that apprentices actually be employed in order to give rise to a jurisdictional dispute which can be resolved by the NMB under Section 2 Ninth of the Railway Labor Act, as the NMB contends, then apprentices must actually be employed before any union can represent them for purposes of serving a Section 6 notice, and the apprentice notices served by the BLF&E are clearly invalid and nonbargainable as no such apprentice was then employed by any of the carriers.

### A. *If Apprentices Training to Become Locomotive Engineers Come within the Craft of Locomotive Engineers, the BLF&E Apprentice Notices Are Invalid and Nonbargainable.*

Section 6 of the Railway Labor Act requires "[c]arriers and representatives of the employees" to give "notice of an intended change in agreements affecting rates of pay, rules, or working conditions. . . ." Thus, Section 6 notices are the means for initiating collective bargaining over proposed agreements as to the rates of pay, rules or working conditions of railroad employees. Disputes over such Section 6 proposals are referred to as "major" disputes. They are to be distinguished from "minor" disputes, which are controversies over the meaning or application of the existing agreements. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 722-725 (1945).

Minor disputes, if not settled by agreement, may be submitted to the National Railroad Adjustment Board or to a local adjustment board for arbitration. 45 U.S.C. § 153. A union may not strike or exercise other self-help with respect to such disputes either before or after the decision

be made by the NMB. See pp. 60-62, *infra*. The problems now before this Court have arisen because the NMB, nevertheless, has refused to determine the jurisdictional dispute between the BLE and the BLF&E.

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of the adjustment board. *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963); *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957). In major disputes, on the other hand, a settlement cannot be imposed upon the parties by some outside agency, but they are required to exhaust procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966). They must exert every reasonable effort to reach an agreement settling the dispute (45 U.S.C. § 152 First) in conferences (45 U.S.C. § 152 Second) and in mediation by the NMB (45 U.S.C. §§ 155, 156); a proffer of arbitration is made if mediation is unsuccessful (45 U.S.C. § 155 First), and if that proffer is rejected and a settlement is not otherwise reached, the President in his discretion may create an emergency board to make recommendations for a settlement (45 U.S.C. § 160). Only after all these procedures have been exhausted may the parties resort to self help, including strikes by the union. *Railway Clerks* v. *Florida E.C.R. Co.*, *supra* at 243-244 (1966); *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 291 (1963).[4]

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[4] The courts have jurisdiction to enforce these (and other) mandates of the Railway Labor Act. *E.g.*, *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 542-553 (1937). Thus, a carrier may be required to bargain with the union representing a craft of its employees and enjoined from bargaining with any other union, *Virginian Ry.* v. *Federation*, *supra*, and it may be enjoined from making unilateral changes in its agreements as to rates of pay, rules or working conditions prior to exhausting the major dispute procedures of the Act, *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 119 U.S. App. D.C. 91, 337 F.2d 127, 131-133 (1964). See, *e.g.*, *Southern Ry. Co.* v. *Brotherhood of Locomotive Fire. & Eng.*, — U.S. App. D.C., —, 384 F.2d 323, 326-327 (1967). Similarly, a strike by a union over a major dispute prior to exhaustion of the Act's procedures is illegal. *Brotherhood of Railway, Etc.* v. *Railroad Retire, Ed.*, 99 U.S. App. D.C. 217, 239 F.2d 37, 41-44 (1956), and may be enjoined, *Brotherhood of Loc. Fire. & Eng.* v. *Bangor and Aroostook R. Co.*, —U.S. App. D.C.—, 380 F.2d 570, 582-584 (1967).

This does not mean, however, that a carrier (or union) which is served with a Section 6 notice necessarily must bargain about the proposals made therein, under threat of being struck if no agreement is reached. A purported Section 6 notice which does not relate to future changes in "rates of pay, rules, or working conditions" is invalid and nonbargainable. *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, — U.S. App. D.C. —, 385 F.2d 581, 599-604 (1967). And, more importantly for present purposes, a Section 6 notice is invalid and nonbargainable if it is served by a union which is not the authorized representative of the employees whose "rates of pay, rules, or working conditions" would be affected by the proposal made in the notice. *Southern Pacific Co.* v. *Switchmen's Union of North America*, 356 F. 2d 332 (9th Cir., 1965); *Order of Railway Cond. & Brake.* v. *Switchmen's Union*, 269 F.2d 726, 730-732 (5th Cir., 1959). See also, *Switchmen's Union* v. *Southern Pacific Co.*, 253 F.2d 81, 84 (9th Cir., 1958); *Brotherhood of Railroad Trainmen* v. *Smith*, 251 F. 2d 283, 287 (6th Cir., 1958).

Thus, if the apprentices whose "rates of pay, rules and working conditions" the BLF&E proposes to establish in the Section 6 notices with which we are here concerned do not come within the craft of locomotive firemen, which the BLF&E is authorized to represent, those notices are invalid and nonbargainable, and the carriers are not required by the Railway Labor Act to bargain with the BLF&E over those notices. Indeed, if the apprentices come within the craft of locomotive engineers represented by the BLE, as that union contends, it clearly would be unlawful for the carriers to bargain with the BLF&E in that regard. The BLE is the exclusive representative of all employees in the craft which it represents.

That this is so has been established at least since the decision by the Supreme Court in *Virginian Ry.* v. *Federa-*

*tion*, 300 U.S. 515 (1937). In that case, a carrier refused to treat with the union certified to represent a craft of its employees, and sought to deal with another union concerning the rates of pay, rules and working conditions of such employees. The trial court required the carrier to bargain with the certified union and restrained it from bargaining with the other union, and the Supreme Court affirmed, stating (*id.*, at 548-549) that:

> "Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other."

In short, if the BLE is the "true representative" of the apprentices, the carriers not only have an "affirmative duty" to treat with the BLE concerning their rates of pay, rules or working conditions, but also have a "negative duty to treat with no other" union, including the BLF&E, in that regard.

The NMB contends in its brief (pp. 34-35, 40-41), however, that this constitutes a 'misreading" of the *Virginian Railway* decision and that the carrier may be required to bargain with the BLF&E (under threat of strike if it does not agree to that union's proposals), even if the BLE is the

"true representative" of the apprentices, because the BLF&E has "an interest" in the training of apprentices to become locomotive engineers. We believe that an examination of the *Virginian Railway* opinion will suffice to convince the Court that the "misreading" has been by the attorneys for the NMB. But, if there has been any "misreading" on our part, that "misreading" has been shared so long and so consistently by the Supreme Court [5] and the lower courts [6] that it has become established law. Even the BLF&E concedes (Br., at 31) that "once a craft of employees is actually employed on a carrier, only one union can be the statutory bargaining representative of the workers."

Moreover, as the Supreme Court indicated in the above quotation from *Virginian Railway*, the principle that only one union can represent the members of a craft employed by a carrier is grounded upon the language of the Railway Labor Act.[7] For example, Section 2 Fourth provides that

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[5] *E.g., Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 659 (1965); *Machinists* v. *Street*, 367 U.S. 740, 759-760 (1961); *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957); *Railway Employees Dept.* v. *Hansen*, 351 U.S. 225, 233 (1956); *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 728 (1945); *Steele* v. *L. & N. R. Co*, 323 US. 192, 200 (1944); *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 335 (1943).

[6] The lower court decisions citing *Virginian Railway* for the proposition that the authorized bargaining agent is the exclusive representative of all members of the craft are too numerous to cite. They include the opinion by this Court in *National Federation of Ry. Workers* v. *National M. Board*, 71 App. D.C. 266, 110 F.2d 529, 538 fn. 14 (1940). We do not know of any case in any court which questions that proposition, insofar as major disputes are concerned. *McElroy* v. *Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir., 1968), petitions for cert. pending, Nos. 81 and 128 (O.T. 1968), held that another union could represent employees in minor disputes, but the Seventh Circuit cited *Virginian Railway* for the proposition (*id.*, at 968) that: "Of course, as to major disputes, it is unquestioned that the Engineers' union is exclusively entitled to represent the plaintiffs, when working as locomotive engineers, by virtue of Section 2 Ninth of the Railway Labor Act."

[7] The same rule applies under the Labor-Management Relations Act. 29 U.S.C. §159(a). See, *e.g., Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967).

the "majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act," and Section 2 Ninth provides that "the carrier shall treat with the union so certified [by the NMB] as the representative of the craft or class for the purposes of this Act."

A contrary rule could hardly have been included in an Act which has the purposes to "avoid any interruption to commerce or to the operation of any carrier engaged therein" and to "provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions. . . ." 45 U.S.C. § 152 Second. It seems obvious that strikes interrupting commerce and the operation of the carriers would be multiplied and chaos, rather than "orderly settlement" of major disputes, would result, if the carriers could be required to bargain separately with two (or more) unions concerning the rates of pay, rules, or working conditions of the same group of employees, such as apprentices training to become locomotive engineers. Where two rival unions such as the BLE and the BLF&E are concerned, it certainly is more than possible that their demands will differ. The carriers could not agree with one without rejecting the demands of the other. If both unions have the right to serve Section 6 notices and require the carriers to bargain thereon, the disappointed union would have the right to strike once the procedures of the Act were exhausted with respect to its Section 6 notice. And, the carrier could not avoid or bring about an end to that strike by agreeing with the striking union without violating its obligation not to depart unilaterally from its agreement with the other union. "These then are not such disputes as can be resolved by capitulation of the railroad and thus are not the proper subject of a section 6 notice." *Southern Pacific Co.* v. *Switchmen's Union of North America,*

*supra* at 335; see, also, *Order of Railway Cond. & Brake.* v. *Switchmen's Union, supra* at 731.

The NMB, in its brief (pp. 35, 41), cites two of the many cases arising out of a complicated "crew complement" controversy in the airline industry (which is also subject to the Railway Labor Act) to support its argument that the authorized representative is not necessarily the exclusive representative of all members of the craft, so that the carriers may be required to bargain with the BLF&E over its Section 6 notices even if the apprentices come within the craft of locomotive engineers.[8] Neither of those cases stand for that proposition, however, and a similar contention was rejected in the course of that litigation. In one of the cases cited by the NMB,[9] the court held that the Flight Engineers Union could strike Pan American after exhausting the procedures of the Act with respect to a Section 6 notice proposing changes in the rates of pay, rules and working conditions of flight engineers. In the other case cited by the NMB,[10] the court held that Eastern Air Lines could implement its proposals concerning the

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[8] Without attempting to explain the many ramifications of the "crew complement" controversy, the heart of the matter, as we understand it, is as follows: The personnel in the cockpits of four-engine and jet airplanes were divided into two crafts—pilots and flight engineers. Existing agreements with the Pilots Union required three pilots in each such plane, while existing agreements with the Flight Engineers Union required one flight engineer. The airlines were determined to reduce the crews to three men, as federal regulations permitted. The Pilots Union was determined to prevent that reduction being made at the expense of the pilots craft, while the Flight Engineers Union was determined that it not be made at the expense of the flight engineers craft. In addition, the Flight Engineers, as the smaller union, was concerned to prevent merger of the two crafts into one, as had been recommended by an *ad hoc* Presidential Commission (the Feinsinger Commission).

[9] *Pan American World Air* v. *Flight Eng. Intern. Assoc.*, 306 F.2d 840 (2d Cir., 1962).

[10] *Flight Engineers Int. Ass'n, EAL Chap.* v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D. N.Y., 1962), aff'd per curiam, 307 F.2d 510 (2d Cir., 1962).

rates of pay, rules and working conditions of flight engineers, after exhausting the procedures of the Railway Labor Act with respect thereto in bargaining with the Flight Engineers Union. There was no contention, in either case, that the Flight Engineers Union (or the carrier involved) was attempting to or could bargain about the rates of pay, rules or working conditions of the pilots craft or of anyone other than the members of the flight engineers craft.

The "crew complement" case which is in point, for present purposes, is *Ruby* v. *American Airlines, Inc.*, 329 F.2d 11 (2d Cir., 1964). In that case, the Flight Engineers Union and American had served each other under Section 6. After a tentative agreement for merger of the Flight Engineers and Pilots Unions had been reached, there were some negotiations in which both unions participated, but the Flight Engineers Union "steadfastly maintained its right separately to represent and bargain for the flight engineers." *Id.*, at 16. Subsequently, American demanded that a "joint committee" of the two unions negotiate a single agreement covering all cockpit members. The Flight Engineers Union refused that demand, pointing out that it was the representative of the flight engineers unless and until a merger of that craft with the pilots craft actually occurred. American then refused to bargain further with the Flight Engineers Union except through a "joint committee," and instead "bargained separately *with the pilots* [union] *over the wages to be paid to the flight engineers. . . .*" *Id.*, at 20; emphasis by the Court. The Flight Engineers Union obtained an injunction requiring American to bargain exclusively with that union about the rates of pay, rules and working conditions of the flight engineers, and restraining American and the Pilots Union from bargaining about that subject. The Second Circuit affirmed, quoting and relying

(*id.*, at 20-21) upon the identical quotation from *Virginian Railway* that we quote and rely upon at p. 24, *supra*.

In short, the "crew complement" litigation, when viewed as a whole, demonstrates that our reading of *Virginian Railway* is the correct reading; that the pertinent holding of that case remains good law and the authorized representative of a craft is the exclusive representative of all members of the craft, so that the carrier may not lawfully bargain with another union concerning the rates of pay, rules or working conditions of any member of that craft; and that, if apprentices training to become locomotive engineers are within the craft of locomotive engineers as the BLE contends, the apprentice notices are invalid and neither the BLF&E nor the carriers may lawfully bargain about such notices. Moreover, as we shall show (pp. 31-32, *infra*), other cases arising out of the "crew complement" controversy support the holding by Judge Sirica that the carriers cannot be required to bargain with BLF&E over its apprentive notices unless and until the jurisdictional dispute between the BLE and the BLF&E is settled in favor of the BLF&E so that the carriers will know that the BLF&E is in fact the representative of the apprentices.

B. *Until the BLF&E Is Authoritatively Determined To Be the Representative of the Apprentices, the Carriers Cannot Be Required to Bargain with the BLF&E about the Rates of Pay, Rules and Working Conditions Applicable to Such Apprentices.*

We have demonstrated that the carriers could not lawfully bargain with the BLF&E over its Section 6 notices concerning the rates of pay, rules and working conditions applicable to apprentices training to become locomotive engineers if those apprentices come within the craft of locomotive engineers so as to be represented by the BLE, as that union contends. This being so, we think it obvious

that the carriers cannot be compelled to risk violating the law by bargaining with the BLF&E over its apprentice notices until the jurisdictional dispute between the BLE and the BLF&E is resolved and an authoritative determination is made that the BLF&E in fact is the "true representative" of the apprentices. As was stated in *Southern Pacific Co.* v. *Switchmen's Union of North America,* 356 F.2d 332, 335 (9th Cir., 1965), a Section 6 notice which "invades the area of jurisdictional disputes covered by Section 2, Ninth, of the Act . . . reaches beyond the area in which the railroad is free to exercise its business judgment, and with respect to which it is a proper adversary of the union. It encompasses a delineation of the line between competing crafts—the line which serves to separate the representational authority of competing unions—and thus reaches into an area over which the railroad has no power of judgment and in which another union, and not the railroad, is the true adversary. These then are not such disputes as can be resolved by capitulation of the railroad and thus are not the proper subject of a section 6 notice."

Thus, Section 2 Ninth of the Act provides a machinery for settling "any dispute [which] shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of" the Act, but in the event of such a dispute, Section 2 Ninth also provides that "the carrier shall treat with the representative" of the employees only after the NMB, following an appropriate investigation, has "certified" to the parties "the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. . . ." See *Railway Employees' Co-Op. Ass'n.* v. *Atlanta, B. & C. R. Co.,* 22 F. Supp. 510, 514 (D. Ga., 1938).

Insofar as we are aware, all of the cases which have con-

sidered the subject support the view that a carrier cannot be required to bargain with a union while its authority to represent the employees involved is in doubt.[11] In addition to the cases cited above, this issue also arose in two cases arising out of the "crew complement" controversy to which we have already referred in another connection (pp. 27-29, *supra*).

*Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248 (2d Cir., 1963), arose after most of the pilots employed by American Airlines became dissatisfied with the representation they were receiving from their existing union (ALPA) in the crew complement matter and formed another union (Allied). While a representation dispute as to which of those two unions was entitled to represent the American pilots was pending before the NMB, ALPA sued to compel American to continue bargaining with it and to restrain American from bargaining with Allied. The Second Circuit held that "the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth" (*id.*, at 255), and affirmed a dismissal of the complaint. See, also, *Teamsters* v. *Alleghany Airlines, Inc.*, 1968 CCH Labor Cases ¶ 12,944 (D.D.C., 1968).

*Flight Engineers' Inter. Ass'n* v. *Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir., 1963), is even more directly in point. In that case, Eastern instituted a program whereby pilots were given training as flight engineers so as to become "pilot-engineers." Both the Flight Engineers Union and

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[11] Of course, a carrier may voluntarily do so, but in that event it "acts at peril of being right." *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 254 (2d Cir., 1963). See also, *Teamsters* v. *Alleghany Airlines*, 58 CCH Labor Cases ¶12,944 (D.D.C., 1968). In this case, the Louisville & Nashville Railroad Company had such a pressing need for an additional source of locomotive engineers that it could not await an authoritative determination of the dispute between the BLE and the BLF&E. See p. 48, *infra*.

the Pilots Union contended that the "pilot-engineers" came within the craft which they represented. The Flight Engineers sued to require Eastern to bargain with it about the rates of pay, rules and working conditions applicable to such "pilot-engineers," and to restrain Eastern from bargaining with the Pilots Union in that regard. In affirming a dismissal of the complaint, the Second Circuit stated (*id.*, at 746-747) that:

> "Under the Railway Labor Act . . . it is the duty of the courts to enforce the statutory command to bargain collectively. . . . But the courts may act only where it is clear that the duty to bargain exists. Where there is doubt as to representation and where there are rival jurisdictional claims, those doubts are to be resolved and the claims are to be vindicated or rejected not by the courts but by the administrative and other processes provided by the Act. . . ."

Just as there was doubt in that case as to "representation" of the "pilot-engineers" and "rival jurisdictional claims" between two unions, in this case there is doubt as to "representation" of the "apprentices" and "rival jurisdictional claims" between two unions. So, too, in this case as in that case those "doubts" should be resolved by the administrative processes provided by the Act rather than by compelling the carriers to bargain with one of the unions in possible violation of the law.

In *Flight Engineers' International Ass'n, EAL Chap.* v. *C.A.B.*, 118 U.S. App. D.C. 112, 332 F. 2d 312 (1964), this Court affirmed a dismissal by the CAB of a petition by the Flight Engineers Union against Eastern which raised charges similar to those made by the union in the Second Circuit litigation. In so doing, this Court referred approv-

ingly to the above-described decision by the Second Circuit.[12]

If a carrier properly may refuse to bargain with a union while doubts exist as to whether the union represents the employees involved because of 'rival jurisdictional claims" between that union and another union, obviously the union may not strike to compel such bargaining before those doubts are resolved. In *Pan American World Airways* v. *International Bro. of Team.*, 275 F. Supp. 986 (S.D. N.Y., 1967), the Clerks were enjoined from striking Pan American over its refusal to bargain upon a Section 6 notice, in view of a representation dispute between the Clerks and another union which was then pending before the NMB. In *Long Island Railroad Co.* v. *System Federation No. 156,* 289 F. Supp. 119, 126 (E.D. N.Y., 1968), the court enjoined a union slowdown over a grievance which was so indefinite that it was not clear "whether the differences between the parties may best be settled by the National Mediation Board, the National Railroad Adjustment Board" or a local adjustment board, where the union had not "utilized" any of those possible remedies. To permit the BLF&E to strike the carriers over its apprentice notice while doubts exist as to whether the BLF&E or BLE is entitled to represent the apprentices would be to subvert the administrative processes provided in Section 2 Ninth of the Act for the

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[12] We note that, under the Labor-Management Relations Act, an employer "need not bargain with an uncertified representative if he has grounds in good faith for doubting the union's majority status," *International Ladies' Garment Wkrs' Union* v. *N.L.R.B.,* 108 U.S. App. D.C. 68, 280 F.2d 616, 621 (1960), aff'd, 366 US. 731 (1961), and that such good faith doubts may relate to the appropriateness of the bargaining unit which the union claims to represent, *N.L.R.B.* v. *Hannaford Bros. Co.,* 261 F.2d 638, 640 (1st Cir., 1958). Conflicting claims by two unions are in themselves sufficient to give rise to good faith doubts as to whether one of the unions is the appropriate bargaining representative of the employees involved. *N.L.R.B.* v. *Downtown Bakery Corp.,* 330 F.2d 921, 928 (6th Cir., 1964).

settlement of such interunion disputes. *Cf., Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30 (1957).

C. *If Apprentices Must Be Employed before There Can Be A Dispute for Purposes of Section 2 Ninth of the Railway Labor Act, Apprentices Must Also Be Employed before A Notice Can Be Served on Their Behalf under Section 6 of the Act.*

The principal argument made by the NMB in its brief (pp. 19-27) to support its refusal to resolve the jurisdictional dispute between the BLE and the BLF&E is that, until apprentices are actually hired, there are no employees for purposes of the requirement in Section 2 Ninth of the Act that the Board determine "any dispute [which] shall arise among a carrier's *employees* as to who are the representatives of such *employees*" (emphasis added). The NMB points out (Br., at 20), in that regard, that Section 1 Fifth of the Act defines "employee" as a "person in the service of a carrier" who meets certain other qualifications, and that Section 1 Sixth defines "representative" to mean "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their *employees*, to act for *them*" (emphasis added).

Assuming that argument to be correct, the apprentice notices served by the BLF&E undoubtedly are invalid and the carriers need not bargain about such notices. Just as apprentices must be employed before there can be "employees" for purposes of a dispute "among . . . such employees" for purposes of Section 2 Ninth, apprentices must be employed before any union is entitled to serve notices of proposals concerning the rates of pay, rules or working conditions applicable to such "employees." Under Section 6 of the Act, only the carriers "and the representatives of the *employees*" (emphasis added) may serve notice of pro-

posals "affecting rates of pay, rules or working conditions," and the carriers are required by Section 2 Second to confer about such proposals only with "representatives designated and authorized so to confer . . . by *the employees* thereof interested in the dispute" (emphasis added). So, too, the mediation services of the NMB may be invoked only by a party "to a dispute between *an employee or group of employees* and a carrier. . . ." (45 U.S.C. § 155 First; emphasis added.) [13]

This interpretation of the Act makes considerable sense. A carrier could unilaterally establish an apprentice engineer program if and when one is needed to provide an additional source of engineers. But once the program is established and apprentices are employed, "employees" then exist for purposes of the Act and the "representatives" of those employees can propose changes in the rates of pay, rules or working conditions applicable to them if dissatisfied with the carrier's program in that regard. If a dispute shall arise among those employees, then the NMB undoubtedly must determine "who are the representatives of the employees" under Section 2 Ninth. All of the pertinent provisions of the Act would be interpreted and applied in a consistent, integrated manner calculated both to preserve "[f]reedom of choice in the selection of representatives on each side" and to promote the "major purpose of . . . the Railway Labor Act . . . 'to provide a machinery to prevent

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[13] It has been held under the Labor-Management Relations Act that a proposal to expand the scope of the bargaining unit is not within the area of mandatory bargaining. See, *e.g., Int'l Longshoremen's Ass'n* v. *N.L.R.B.*, 107 U.S. App. D.C. 329, 277 F.2d 681 (1960). So, too, a "condition precedent" to employment is not a "condition of employment" about which bargaining is required. See, *e.g., Local 164, Brotherhood of Painters,* v. *N.L.R.B.*, 110 U.S. App. D.C. 294, 293 F.2d 133, 135 (1961). The BLF&E notices would make successful completion of the proposed apprentice program a "condition precedent" to employment as an engineer (JA 65, 252).

strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565, 569 (1930).

We note later (pp. 65-66, *infra*) that the NMB's argument is defective insofar as its dismissal of the BLE's application for a Section 2 Ninth determination on the L&N is concerned because that carrier had employed apprentices before the application was either filed or dismissed. This defect does not exist, however, insofar as the Section 6 notice served by the BLF&E upon the L&N is concerned, since that carrier did not establish its apprentice training program until after the Section 6 notice was served (JA 331-332). Hence no "employees" existed on that carrier, as well as on all of the other carriers, for the BLF&E to represent for purposes of the requirement in Section 6 that such notices be served by "representatives of the employees."

The BLF&E (Br., at 31-32) bases a contrary and, we believe, falacious argument upon the fact that no apprentices were employed when its Section 6 notices were served. It concedes that "once a craft of employees is actually employed on a carrier, only one union can be the statutory bargaining representative of the workers," citing the *Virginian Railway* case (see pp. 23-25, *supra*). "But until a new skill category or subcategory is created, there is no principal of law that only one union can have a sufficient interest in the prospective group of workers so as to require bargaining by a carrier for the creation of such a skill category." BLF&E Br., at 31. In other words, while only one union may represent "employees" and serve Section 6 notices in their behalf, two, three or a dozen unions may "represent" a "prospective group of workers" and serve Section 6 notices in their behalf.

The mere statement of such a proposition should be sufficient to demonstrate its irrationality. Plainly, a carrier

should not be put into a position where it could be required to bargain with two or more unions concerning the rates of pay, rules or working conditions applicable to the same "prospective group of workers," with each union being in a position to strike the carrier if it did not agree with that union's notice of what those rates of pay, rules and working conditions should be. What possible justification could there be for such a procedure when, as the BLF&E concedes, only one of the unions may represent the workers when they are actual rather than "prospective"? If apprentices training to become locomotive engineers come within the craft of locomotive engineers once actually employed so that only the BLE can then bargain with the carriers concerning their rates of pay, rules and working conditions, why should the BLF&E also be permitted to bargain with the carriers about that matter before the apprentices are employed? In any event, the BLF&E's argument has no basis whatsoever in the language of the statute and the BLF&E does not purport to claim that its argument is supported by legislative history. As we have demonstrated, the NMB's interpretation of "employees" leads to the conclusion that no union can serve a Section 6 notice with respect to a "prospective" group of employees. But if any union can do so, that must be the union—and only the union—which will be the "representative of the employees" when they are actual rather than "prospective."

### D. *The Court Below Had Jurisdiction to Render Its Decision as to the Section 6 Notices.*

The BLF&E seeks to give the impression that the NMB, by docketing its Section 6 notices for mediation, has determined that those notices are valid and bargainable, and that such a determination is not reviewable by the courts. No such argument is made by the NMB, and for good reason.

The argument by the BLF&E confuses the functions of the NMB in Section 2 Ninth disputes with its functions in mediation and ignores the fact that the judicial function differs sharply as between reviewing Section 2 Ninth determinations and determining whether or not a carrier must bargain with a union over a Section 6 notice.

Section 2 Ninth of the Act provides that "it shall be the duty of the Mediation Board" to investigate disputes as to "who are the representatives" of a carrier's employees and "to certify to both parties" and "to the carrier" the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute...." Hence, in acting upon the merits of a Section 2 Ninth dispute the NMB exercises an adjudicatory function; it determines "who are the representatives" of the employees. In *Switchmen's Union* v. *Board,* 320 U.S. 297 (1943), the Supreme Court held that NMB craft or class determinations and certifications under Section 2 Ninth are not reviewable by the courts. In *General Committee* v. *M.-K.-T. R. Co.,* 320 U.S. 323 (1943), and *General Committee* v. *Sou. Pac. Co.,* 320 U.S. 338 (1943), the Supreme Court held that such craft or class determinations could not be made independently by the courts And, in *Railway Clerks* v. *Employees Assn.,* 380 U.S. 650 (1965), the Supreme Court held that the courts *do* have jurisdiction to require the NMB to exercise its duties under Section 2 Ninth.

All of the other cases cited by the BLF&E (Br., at 44-61) for the proposition that the courts have no jurisdiction to review determinations by the NMB involved either attempts to have the courts review Section 2 Ninth determinations by the NMB or to decide issues within the jurisdiction of the NMB under Section 2 Ninth. None of those cases, and no other case of which we are aware, either holds or suggests that the docketing of a Section 6 notice by the NMB for

mediation constitutes an adjudication that the notice is valid or bargainable or prevents the courts from deciding such issues.

Unlike its functions under Section 2 Ninth, the mediation functions of the NMB are not adjudicatory in nature. *Pan American World Airways* v. *International Bro. of Team., supra* at 995; *cf., Great Northern Ry. Co.* v. *Railway Conductors & Brakemen,* 53 CCH Labor Cases ¶11,260 (D. Minn., 1966). When the mediation services of the Board are invoked, its function is to "put itself in communication with the parties to the controversy, and . . . and use its best efforts, by mediation, to bring them to agreement," and, if its efforts in that regard are unsuccessful, to "endeavor . . . to induce the parties to submit their controversy to arbitration" under Sections 7 and 8 of the Act. 45 U.S.C. § 155 First. The Board itself has made clear that it does not determine the validity or bargainability of Section 6 notices in exercising that function. In *AAL Chapter, Flight Engineers' International Association* v. *National Mediation Board,* Civil Action No. 522-61 (D.D.C., 1961), there was a controversy as to whether a Section 6 notice was improper because barred by the terms of an existing agreement. In a letter to the parties set forth in paragraph 6 of the findings of fact made by the District Court, the NMB stated that:

> "... The Board is not the proper tribunal to interpret or otherwise rule as to whether items set forth in a Section 6 notice by either a union or a carrier are barred by the terms of the existing collective bargaining agreement. Moreover, *the fact that the Board accepted the application for mediation and assigned a docket number to it constitutes no determination by this Board that the issues raised by the union can be progressed at this time.*
>
> "... [T]he Board suggests that the controversy

> whether certain items in the union's Section 6 notice of January 25, 1960, may properly be progressed at this time, be submitted to a competent tribunal for an immediate and binding determination." (Emphasis added.)

Indeed, the BLF&E has held in the course of this very controversy that it cannot decide the dispute between the BLE and the BLF&E pursuant to its mediation functions. When the carriers (who do not have a right to file an application under Section 2 Ninth)[14] sought to invoke the Board's mediation services for that purpose, their application was dismissed by the NMB on the ground that it posed "a question of representation" and that such "issues are resolved under Section 2, Ninth, of the Railway Labor Act" (JA 101, 334-335). And, the NMB has not attempted to proceed with mediation of the Section 6 notices in question since this suit was filed, in obvious deference to the jurisdiction of the courts to determine whether the carriers are required to bargain at this time over those notices.

It has been established at least since the *Virginian Railway* case that the courts have jurisdiction to compel carriers subject to the Railway Labor Act to perform their duties to bargain under that Act, and thus to determine in a particular situation whether that duty exists. See pp. 21-29, *supra*. In *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), the Supreme Court determined issues as to the validity and bargainability of Section 6 notices served by a union, and in *Locomotive Engineers* v. *B. & O. R. Co.*, 372 F. 2d 284 (1963), the Court determined similar issues with respect to Section 6 notices served by the carriers. In both cases, the Section 6 notices had been docketed by the NMB (and mediation had been had), but in neither case did the

[14] See *Railway Clerks* v. *Employees Assn.*, *supra* at 666-667.

Court purport to give any weight to that fact. Finally, and conclusively, in *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co.*, — U.S. App. D.C. —, 385 F. 2d 581 (1967), this Court exercised jurisdiction to determine whether the carriers were required to bargain about the very Section 6 notices involved here (as well as various others) prior to the expiration of Award 282, and also to determine other issues as to the validity and bargainability of two other Section 6 notices served by the BLF&E upon the carriers at the same time as the notices involved here were served (*id.*, at 594-604). Some of those notices had already been docketed by the NMB, but this Court did not purport to give any weight to that fact.[15]

We submit, therefore, that the jurisdiction of the courts to determine whether the carriers are required to bargain about the BLF&E's Section 6 notices is not affected in any way by the action of the NMB in docketing those notices for mediation. That action did not and could not properly constitute an adjudication that the BLF&E's Section 6 notices are valid and bargainable, as that issue ultimately is for the courts to determine. Of course, to the extent that

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[15] The issues involved in this case had been removed from that case by stipulation of the parties. See 385 F.2d, at 600, and JA 140 in Nos. 20192, 20193, 20215 and 20216. The issues upon which the validity of BLF&E Notices No. 1 and 2 hinged had no connection with the jurisdictional dispute involved here. There is no more substance to the argument by the NMB (Br. 30-31) that the ruling in that case upholding the validity of Notice No. 1 is applicable in this case than there would be to an argument on our part that the ruling invalidating Notice No. 2 is applicable here. For the facts as to the docketing by the NMB of the Section 6 notices, see JA 132-136 in Nos. 20192, etc.; JA 76-79 in Nos. 20158 and 20191; and JA 186-188 in Nos. 20229 and 20249. While the BLF&E did not even contend in that case that the action of the NMB in docketing its notices determined the issues before the Court, the ORC&B (see its Brief in Nos. 20158 and 20191, at 37-41) and the BRT (see its Brief in Nos. 20229 and 20249, at 9-15) did make such contentions, but the Court apparently did not regard them as being substantial enough to warrant discussion.

the validity and bargainability of the Section 6 notices turns upon a resolution of a dispute which the NMB has the duty to adjudicate under Section 2 Ninth of the Railway Labor Act, the courts must defer to the primary jurisdiction of the NMB in that regard. This is the teaching of the 320 U.S. "trilogy" and similar cases. See p. 38, *supra*.[16] So, too, the courts must defer to the primary jurisdiction of the NRAB (or local adjustment boards) under Section 3 of the Railway Labor Act to adjudicate "minor" disputes concerning the interpretation or application of existing collective bargaining agreements.[17] But where "no adequate administrative remedy can be afforded by the National Railroad Adjustment or Mediation Board," because they do not have adjudicatory jurisdiction under Sections 2 Ninth or 3 of the Railway Labor Act, the courts must decide. *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952).[18] And, the courts have jurisdiction to maintain the status quo,[19] where a dispute does involve an issue within the primary jurisdiction of the NMB under Section 2 Ninth or the NRAB under Section 3, including—as we have shown (pp. 29-34), *supra*)—jurisdiction to declare that a carrier need not bargain over a Section 6 notice and to enjoin a union from striking in such circumstances.

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[16] And see, *e.g. Brotherhood of Railway & S.S. Clerks* v. *United Air Lines*, 325 F.2d 576, 579-580 (6th Cir., 1963); *Division No. 14, Order of Railroad Tel.* v. *Leighty*, 298 F.2d 17, 19-20 (4th Cir., 1962).

[17] *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33, 38 (1963); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950); *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946).

[18] See, *e.g., Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 327-328, fn. 3 (1959); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 204-207 (1944).

[19] See, *e.g., Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528 (1960); *Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30 (1957); *Southern Ry. Co.* v. *Brotherhood of Loc. Fire. & Eng.*, — U.S. App. D.C. —, 384 F.2d 323 (1967). The BLF&E concedes that the courts may "maintain the status quo ante while the parties seek administrative relief." Br., at 57, fn. 23.

The BLF&E also contends (Br., at 61-69) that the decision below was premature and that the issues presented here are nonjusticiable at this time because some settlement satisfactory to all might be reached in mediation or other bargaining between the carriers and the BLF&E over the Section 6 notices served by the BLF&E. This contention ignores the facts that the BLE contends that the carriers cannot lawfully bargain at any time with the BLF&E over the Section 6 notices in question and threatens to strike the carriers if they even commence bargaining about the merits of those notices (JA 196, 260, 333), and that the carriers have refused to bargain with the BLF&E about the merits of its Section 6 notices and have made clear that they will continue to so refuse unless and until an authoritative determination is made that the apprentices come within the jurisdiction of the BLF&E so that the carriers are required to bargain (JA 253-254, 334). Hence, the Court is not faced with some abstract issue that may go away, if the case is not now decided, as a result of future bargaining over the Section 6 notices. The Court is faced with a concrete controversy the decision of which will have immediate practical consequences. See *Pan American World Airways* v. *International Bro. of Team., supra* at 993.

We have noted (p. 41, *supra*) that this Court has already decided an issue concerning the duty of the carriers to bargain about the very Section 6 notices involved here, as well as similar issues concerning other Section 6 notices served at about the same time, in *Brotherhood of Railroad Trainmen* v. *Akron & B.B. R. Co., supra.* If those issues were not "premature" or "nonjusticiable," certainly the issues now before the Court do not come within that category. And, other courts have not hesitated to determine issues as to the validity or bargainability of Section 6 notices despite the fact that the procedures of the Railway Labor

Act have not been exhausted with respect to those notices.[20] Consequently, we submit that the Court below had jurisdiction to decide as it did, and was not required to await exhaustion of the procedures of the Railway Labor Act with respect to the Section 6 notices served by the BLF&E.

## II. The National Mediation Board Has the Power and the Duty to Decide the Jurisdictional Dispute between the BLE and the BLF&E and May Be Compelled to Perform that Duty.

There is no real doubt about the fact that a serious dispute exists between the BLE and the BLF&E as to which organization, if either, has jurisdiction to represent apprentices employed by the carriers for training to become locomotive engineers. The NMB, nevertheless, dismissed applications by the BLE under Section 2 Ninth of the Railway Labor Act for a determination of that dispute on the ground that "the Board has no authority to decide a jurisdictional dispute as such" (JA 28). One of those applications related to the Louisville & Nashville Railroad Company ("L&N"), which had already employed apprentices who were being trained to become locomotive engineers, and was filed as a direct outgrowth of litigation brought by the BLF&E in the Sixth Circuit attacking the validity of an agreement between the L&N and the BLE establishing

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[20] In *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), the Supreme Court decided an issue as to the validity of Section 6 notices prior to the appointment of an emergency board. See, also, *Akron, C. & Y. R. Co.* v. *Barnes*, 215 F.2d 423, 428 (7th Cir., 1954), vacated pursuant to agreement of the parties, 348 U.S. 893 (1954). *Southern Pacific Co.* v. *Switchmen's Union of North America*, 356 F.2d 332 (9th Cir., 1965), and *Mount* v. *Grand International Brotherhood of Loc. Eng.*, 226 F.2d 604, 608 (6th Cir., 1955), appear to have been decided before any mediation was had with respect to the Section 6 notices involved. And, in *Virginian Railway* v. *Federation, supra*, the Supreme Court determined whether a carrier had a duty to bargain with the union even though there is no indication that any particular Section 6 notice was pending.

an apprentice training program. The Sixth Circuit held that the jurisdictional dispute between the BLE and the BLF&E, upon which the validity of that agreement depended, is for the NMB to decide under Section 2 Ninth. That decision, as we shall demonstrate, conforms with the language and legislative history of the statute, as well as with other decisions by the courts in similar contexts. Moreover, a determination at this time of the dispute between the two unions would not be premature, and the courts undoubtedly have jurisdiction to require the NMB to perform its duties under Section 2 Ninth.

### A. *The Nature of the Dispute between the BLE and the BLF&E, and Its Handling by the NMB.*

The BLF&E appears to argue both that it has no dispute with the BLE as to which union is entitled to represent apprentices training to become locomotive engineers (Br., at 33-44), and that there is such a dispute but it has been determined by the NMB in favor of the BLF&E (Br., at 25-33). The mere fact of this litigation would appear to refute those contentions, neither of which is joined by the NMB, and the record makes perfectly clear that there is such a dispute which the NMB has refused to decide. Moreover, the dispute is not a "work assignment" dispute, but a dispute as to which union has jurisdiction to represent the apprentices.

The Section 6 notices served by the BLF&E, out of which its dispute with the BLE arose, are not limited to the training or use of apprentices as locomotive firemen; they also include the training and use of apprentices as locomotive engineers. As Judge Sirica found (JA 333), "the BLF&E proposed to require the carriers to establish a program for the training of apprentices who, upon successful completion of the program, would become qualified and receive seniority

as locomotive engineers, and those notices otherwise relate to the training of apprentices to become locomotive engineers."

This is completely clear from the face of the Section 6 notices themselves[21] (see JA 252-253). The Definitions Section of the notice defines "apprentice" to mean "a person who is engaged in learning the craft of Locomotive Enginemen" (JA 56). There is no "craft of locomotive enginemen" (JA 236, 329) and that term, to the extent that it means anything, refers to both locomotive firemen and locomotive engineers. Thus, "[a]ll engine service employees" hired by the carriers would be required to complete the proposed training program (JA 65). There is no craft of "engine service employees" and that term is used in the industry to refer to both locomotive firemen and locomotive engineers (JA 236, 252, 329). All locomotive engineers hired by the carriers as well as all locomotive firemen so hired, consequently, would be required to undergo the training program controlled by the BLF&E, and existing engineers would be among those used in supervising the training of the apprentices (JA 63).

The proposed training program would require a minimum of three years to complete (JA 60). Little or no training is required to perform the duties of locomotive firemen,[22] and even the proposed program (JA 68-69) would qualify the apprentices to work as firemen during the first nine-months period after only one student trip in a passenger locomotive, one on a freight locomotive, and two on a yard

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[21] We quote from the Section 6 notice identified as "Notice No. 3" (JA 56-69) as it was served on all of the carriers except one. The apprentice notice served on the L&N and a second such notice served on the Southern Pacific make substantially the same proposals, as Mr. Gilbert, President of the BLF&E, admitted in his affidavit filed below (JA 141; see JA 233).

[22] A period of three years is far more than is necessary for the training of engineers, as the experience of the L&N demonstrates, but a single student trip often is sufficient training for a fireman (JA 249, 252-253).

locomotive. Thereafter, any training necessarily would be for the purpose of qualifying as a locomotive engineer, and the proposed program provides that during the second nine-months of the training period "the apprentices will take assigned duties in all classes of engine service work . . ." (JA 69). Since "engine service" refers to both crafts or classes, the apprentices thus would work as locomotive engineers as well as locomotive firemen. And, upon successful completion of the training program, the apprentices would "be qualified as a railroad locomotive engineer" and would "receive a seniority date as locomotive engineer" (JA 67). The training program would be administered by a joint committee on which the BLF&E and the carrier would have equal representation, and the BLE would have no representation at all (JA 57-58).

Hence, the Section 6 notices served by the BLF&E undoubtedly concern the training of apprentices to become locomotive engineers and, if the BLE is correct as to its jurisdiction, encroaches upon the jurisdiction of the BLE to represent such apprentices. Neither the BLE nor the carriers had any difficulty in recognizing that fact, and they did not waste any time in asserting their positions. Approximately two days after the notices were served, the BLE notified the carriers (JA 17-19, 333) that the BLF&E's proposal "infringes upon the statutory rights of [the BLE as] the duly designated representative of the craft of locomotive engineers" and "is in violation of the Railway Labor Act", and informed the carriers that the BLE would proceed to enforce its rights if they negotiated or agreed with the BLF&E.[23] And, the carriers informed the BLF&E

[23] The BLE amplified its objections to the BLF&E notices, in an affidavit filed by one of its officers in the court below (JA 190-196, 201), and made "clear" that it "is prepared to take any and all action . . . , including the exercise of its right to strike, in order to maintain inviolate its statutory authority as the certified or authorized bargaining representative on this subject" (JA 196).

that in their view its notices were "not valid and bargainable" under Section 6 of the Act (JA 233, 334).

The BLF&E also demonstrated, *by its own actions*, that it disputes the claim by the BLE to represent apprentices training to become locomotive engineers, just as the BLE disputes the claim of the BLF&E in that regard. Unlike firemen, engineers are essential to the operation of locomotives (JA 261). Some time after the BLF&E served its apprentice notices, the L&N reached a point where it had to train persons to become engineers in order to assure itself of enough engineers to continue unimpeded operation. Thus, the L&N established an apprentice engineer training program and, since it believes that the apprentices come within the jurisdiction of the BLE rather than within the jurisdiction of the BLF&E, entered into an agreement with the BLE concerning the wages to be paid to the apprentices. JA 25, 248-250, 318-321, 331.[24] The BLF&E promptly brought suit, in the Western District of Kentucky, to enjoin enforcement of that apprentice training program claiming (as that court found) that it—rather than the BLE—is the exclusive bargaining representative of the apprentices (JA 197-198, 250-251, 335). As we show at pp. 54-56, *infra*, both the District Court and the Sixth Circuit Court of Appeals held that this dispute was for the NMB to decide under Section 2 Ninth of the Act.

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[24] Applicants for the training program are hired as apprentice locomotive engineers, not as firemen or engineers. The apprentices are not used as firemen or to perform any fireman duties, but are trained to become engineers. After completing the program, apprentices are hired as engineers if engineer positions are available. If not needed as engineers at the time, they may be hired as firemen, just as anyone acceptable to the carrier may be hired as a fireman. Under the schedule agreement between the carrier and the BLF&E, persons hired as engineers also receive a fireman's seniority date and such persons are subject to the "promotion" and "demotion" rules contained in the carriers' agreements with the BLE and the BLF&E. The L&N continues to promote qualified firemen to engineers in accordance with those rules, and the apprentice training program has not interfered with the rights of any fireman in that regard.

Plainly, therefore, there is a dispute between the BLE and the BLF&E as to which organization has jurisdiction to represent apprentices training to become locomotive engineers. The argument by the BLF&E (Br., at 37-38) that there is no such dispute on the L&N because "the BLE was not aggrieved; it had everything it wanted in regard to the apprentice locomotive engineers employed on the L&N" ignores the fact that the BLF&E was "aggrieved" and did not get what it "wanted"—invalidation of the apprentice training program established by agreement with the BLE. That argument also ignores the facts that the courts in the Sixth Circuit did not settle the dispute, but held that the NMB should do so, and the BLF&E (Br., fn. 18, at 42-43) intends to file a petition for writ of certiorari. Finally, that argument ignores the fact that resolution of the dispute between the two unions is fundamental to a determination of the validity of the Section 6 notices served by the BLF&E on all the carriers, and not just the L&N, as we have shown in Part I of this Argument.[25]

There is no need to respond to the arguments of the BLF&E (*e.g.*, Br., at 27-31) as to why it, rather than the BLE, has jurisdiction of apprentices training to become locomotive engineers. That question is not for the courts to decide, as the Supreme Court has held (see p. 38, *supra*) and as Judge Sirica recognized (JA 340). We doubt if there is any need to respond to the arguments of the BLF&E (Br., at 25-33) to the effect that the NMB has already decided that jurisdictional dispute in the

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[25] To the extent that the BLF&E (and the NMB) argue that there is no "representational" dispute because everyone agrees that the BLE represents the craft of locomotive engineers and the BLF&E represents the craft of locomotive firemen, and that situation will not be changed by inclusion of the apprentices in either the one craft or the other so an election is not needed, we respond at pp. 67-70, *infra*. In essense, however, this contention begs the real question in dispute: in which (if either) of those crafts do the apprentices fall?

BLF&E's favor, in view of the fact that the NMB is vigorously defending in this Court its refusal to decide the dispute on the ground that it has no authority to do so, at least at this time. We shall touch briefly on the actions of the NMB, however, in part because our account will provide context for other arguments.

We have shown (pp. 37-42, *supra*) that the action of the NMB in docketing the notices for mediation did not constitute a determination that the BLF&E has jurisdiction to represent apprentices training to become locomotive engineers or that those notices otherwise are valid and bargainable. Among other things, as there shown, the NMB dismissed a request by the carriers that it attempt to resolve the dispute between the two unions pursuant to its mediation powers because the "question as posed involved a question of representation" and such "issues are resolved under Section 2 Ninth of the Railway Labor Act." We are forced to agree with that conclusion. But when the BLE filed an application (JA 19-25) under Section 2 Ninth with respect to the apprentices employed by the L&N, pointing out that the BLF&E had disputed the BLE's jurisdiction in the litigation in the Western District of Kentucky previously referred to, the NMB also dismissed that application (JA 26-29).[26]

The NMB did not purport to base that dismissal upon a determination of the merits of the jurisdictional dispute, but upon a legal conclusion that "no dispute within the meaning of Section 2, Ninth," exists (JA 29). That conclusion was based, in turn, upon the view that "the Board has no authority to decide a jurisdictional dispute as such" and that the dispute between the BLE and BLF&E "may involve an issue as to the right of the employees of one

[26] The NMB has never formally acted upon a similar Section 2 Ninth filed by the BLE at about the same time with respect to representation of apprentices on the Southern Pacific (JA 29-31, 336-337).

craft or class to do work commonly done by employees of another craft or class," but "[p]rocedures other than those outlined in Section 2, Ninth, are available" for settlement of that dispute (JA 28). We discuss separately (pp. 54-72, *infra*) the issue of whether the NMB "has authority to decide a jurisdictional dispute as such" under Section 2 Ninth, as that appears to be the key issue in this case. Before doing so, we shall comment briefly on the suggestion that the controversy between the BLE and the BLF&E may be what is often referred to as a "work assignment" dispute and that other procedures are provided by the Act for the settlement of such disputes.

The NMB never responded to a request by the BLE for advice as to the nature of those other procedures, if the NMB adhered to its dismissal of the BLE's Section 2 Ninth application (JA 32-35, 336-337). The only suggestion (and the only possible one) made by the NMB in the course of this case is a proceeding before the National Railroad Adjustment Board, but that procedure is not available here, as the NMB now appears to concede (Br., at 39), and we think it clear that we are not here concerned with a "work assignment" dispute.

The Supreme Court pointed out, in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 263 (1964), that there are at least two kinds of inter-union "jurisdictional" disputes: "(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing particular work." The first category, which comprises work assignment disputes, thus involves claims by two unions that the existing members of their respective crafts are entitled to perform certain work under their agreements with the employer. The second category, on the other hand, involves claims by two unions to have jurisdiction to represent a certain group of

employees so as to be entitled to contract on their behalf.[27]

In *Transportation Union* v. *U.P.R. Co.*, 385 U.S. 157 (1966), two unions contended that their contracts with the railroad entitled their members to operate certain IBM machines. The NRAB took jurisdiction of and decided the claim of one union in that regard without considering the conflicting claim of the other union. The Supreme Court rejected this view that "it is entirely appropriate for the Adjustment Board to resolve disputes over work assignments in a proceeding in which only one union participates and in which only that union's contract with the employer is considered." *Id.*, at 160. Under that procedure, the NRAB could first allow the claim of one union and in a later proceeding allow the claim of the other union "without ever determining which union has the right to perform the job," and thus "the Board abdicates its duty to settle the entire dispute." *Id.*, at 162. "The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature." *Id.*, at 162.

The jurisdiction of the NRAB, however, is limited to disputes "growing out of grievances or out of the interpretation or application of agreements concerning the rates of pay, rules or working conditions . . ." 45 U.S.C. § 153(i). Thus, it may only interpret contracts and does not have jurisdiction to determine the validity of contracts. *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 327-328, fn. 3

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[27] As is explained in the *Carey* case, the NLRB under the Labor-Management Relations Act determines jurisdictional disputes of a representational nature in a unit clarification proceeding, but not those of a work-assignment nature. The Supreme Court also noted that "disputes are often difficult to classify" in that regard (375 U.S., at 269). The NLRB takes the position that where the dispute is one that can be settled by delineating the lines between the two crafts, it has authority to make such a determination in a unit clarification proceeding even though the dispute can be described in work-assignment terms. *McDonnell Company*, 173 N.L.R.B. No. 31, 1968-2 CCH-NLRB ¶20,244. The Board noted in that case that the dispute in *Carey* eventually was settled in that manner.

(1959); *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952). And, *a fortiori,* it does not have jurisdiction to determine the validity of Section 6 notices. The dispute between the BLE and the BLF&E plainly is not a work-assignment dispute within the jurisdiction of the NRAB. The dispute is not over whether firemen or engineers have the right to work as apprentices under the existing contracts. The dispute, rather is over whether the BLE or the BLF&E has jurisdiction to represent the apprentices themselves, and the resolution of that dispute will determine whether the Section 6 notices served by the BLF&E are invalid (as the BLE claims) and whether the apprentice agreement entered into by the L&N and the BLE is invalid (as the BLF&E is claiming in the Sixth Circuit litigation).[28]

Thus, we do not have here a jurisdictional dispute of a work-assignment nature which the NRAB has authority to decide, but a jurisdictional dispute of a representational nature. The basic issue is one of drawing craft lines rather than of interpreting contracts. As we show next, the NMB does have "authority to decide a jurisdictional dispute as such" of that nature.

### B. *The NMB Has Authority under Section 2 Ninth to Decide the Jurisdictional Dispute between the Two Unions.*

The United States Court of Appeals for the Sixth Circuit has already held that the dispute between the BLE and the BLF&E is for the NMB to decide, affirming the decision of the Western District of Kentucky in that case and agreeing with the decision of Judge Sirica in this case. This persuasive authority is supported by the language and legislative history of Section 2 Ninth and by other decisions, and in our opinion should be followed by this Court.

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[28] In addition, the Great Northern Railway Company subsequently entered into an apprentice agreement with the BLE (JA 322-327).

1. *The Decision by the Sixth Circuit.* We have already referred to the litigation which the BLF&E brought to enjoin enforcement of the apprentice training program established by the L&N in agreement with the BLE (p. 48, *supra*). The BLF&E's complaint was dismissed by the trial court on the ground that the dispute between the BLE and the BLF&E as to which union has jurisdiction to represent the apprentices is for the NMB to decide (JA 335). That decision was affirmed in *Brotherhood of Locomotive Fire. & E.* v. *Louisville & N. R. Co.*, 400 F. 2d 572 (6th Cir., 1968). In so doing, the Sixth Circuit stated, among other things, that (*id.*, at 574-575):

> "The Railway Labor Act is a comprehensive statutory plan for resolving disputes between transportation companies and their employees. The Act looks toward the orderly resolution of disputes and sets up procedures whereby this goal may be accomplished. One of the things condemned by the Act is unilateral action by a party to an agreement which has the effect of changing the status quo established by the agreement. A United States District Court has jurisdiction to enjoin such action. . . .
>
> "However, there are certain types of disputes encompassed by the Act which may not be resolved by the courts. *One of these is a representation or jurisdictional dispute between labor unions. . . . Congress has conferred exclusive jurisdiction upon the National Mediation Board to resolve such disputes.*[1] *Section 2 Ninth of the Railway Labor Act, 45 U.S.C. § 152.*" (Emphasis added.)

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[1] It is noted that the United States District Court for the District of Columbia has recently ordered the National Mediation Board to hear this dispute, the Board having originally declined to assume jurisdiction [citing the decision on appeal here]."

With respect to an appeal by the BLF&E in a second case, the Sixth Circuit stated (*id.*, at 575):

> "It is clear that the second case is another attempt to have this jurisdictional dispute between the two unions litigated in federal court. *The rule is plain: Jurisdictional disputes between labor organizations governed by the Railway Labor Act are within the exclusive jurisdiction of the National Mediation Board.*" (Emphasis added.)

We do not urge that the decision of the Sixth Circuit is binding on the NMB, as it was not a party to that litigation. But, one could not find a precedent more closely in point outside the scope of *res judicata*. This case involves the same inter-union jurisdictional dispute as that case, as the Sixth Circuit recognized when it pointed out that Judge Sirica had "ordered the National Mediation Board to hear this dispute. . . ." The issue as to the jurisdiction of the NMB under Section 2 Ninth to decide that dispute was argued before the Sixth Circuit, and its conclusion that the NMB has such jurisdiction obviously reflects a considered judgment rather than a passing *dictum*. The BLF&E does not even attempt to distinguish that decision.[29] The assertion by the attorneys for the NMB (Br., at 43) that the decision of the Sixth Circuit not only "seems correct" (as it does), but also is "wholly consistent with our position" makes one wonder as to what the NMB's position really is.

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[29] The facts that, as the L&N asserted in the Sixth Circuit and here (p. 48, *supra*), its apprentice program is intended to provide a supplemental source of engineers and will not interfere with the promotion of qualified firemen shows that the program could not possibly violate the L&N's agreements with the BLF&E. Those facts do *not* show, as the BLF&E seems to claim (Br., at 35, 68-69), that the L&N agrees that the BLF&E's Section 6 notice does not give rise to a jurisdictional dispute between the BLE and the BLF&E or that agreements for the training of apprentices to become engineers could be entered into with both unions. This should be obvious from the mere fact of this case and of the case in the Sixth Circuit.

If the "rule is plain" that inter-union jurisdictional disputes are "within the exclusive jurisdiction of the National Mediation Board" under Section 2 Ninth, as the Sixth Circuit concluded, and if that rule applies to the instant dispute between the BLE and the BLF&E, as the Sixth Circuit held, it cannot be that the NMB does not have jurisdiction under Section 2 Ninth to decide that dispute, as the NMB said when it dismissed the application filed by the BLE.

We submit, therefore, that the decision by the Sixth Circuit is highly persuasive authority for our contention that Judge Sirica was correct in reaching the same conclusion. And, as we shall show, the "rule" is indeed "plain" that the NMB has the duty under Section 2 Ninth to decide inter-union jurisdictional disputes such as the instant dispute between the BLE and the BLF&E.

2. *The language and legislative history of Section 2 Ninth.* The statute does not purport to exempt "jurisdictional disputes as such" from the "duty of the Mediation Board, upon request of either party to the dispute," to investigate and decide "any dispute" which "shall arise among a carrier's employees as to who are the representatives of such employees. . . ." The NMB may either "take a secret ballot of the employees involved" or "utilize any other appropriate means of ascertaining the names of their duly designated and authorized representatives. . . ." Section 2 Ninth, 45 U.S.C. § 152 Ninth.

Moreover, the Supreme Court has "cautioned against a literal reading of congressional labor legislation; such legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S. 463, 468 (1968). This resort to legislative history to determine the meaning

of labor legislation should be made even if the literal language of the statute may be said to "unambiguously embrace" a particular interpretation. *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 619-620 (1967), and cases there cited. And, this concept has been applied in interpreting the Railway Labor Act. *E.g., Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 488-489 (1957).

The "general objectives Congress sought to achieve" in the Railway Labor Act are set forth in a statement of "General Purposes," 45 U.S.C. § 151a, as follows:

> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

For the Congress to have failed to provide machinery for resolving jurisdictional disputes such as that now existing between the BLE and the BLF&E would serve none of the stated purposes of the Act and could frustrate the achievement of all of those purposes. The settlement of such disputes would be left to a test of strength between the contending unions—to a contest as to which union could conduct the most damaging strike against the carrier or carriers involved so as to force recognition of that union when the other could no longer resist. Since the "major purpose of

. . . the Railway Labor Act was 'to provide a machinery to prevent strikes,' " *Texas & N. O. R. Co.* v. *Ry. Clerks,* 281 U.S. 548, 565 (1930), the Congress could hardly have intended to adopt that alternative. The resolution of jurisdictional disputes by a test of strength between the contending unions could well mean that many of them would be resolved by the carrier ceasing to exist. But even if the carrier survived, such strikes would interrupt commerce and the operation of the carrier therein, interfere with the right of the employees subject to the dispute to choose their own representative, and delay the "prompt and orderly settlement" of disputes as to rates of pay, rules, working conditions and grievances until the union entitled to represent the employees was settled through such strikes.

But one is not restricted to the "general objectives" of the Railway Labor Act for purposes of determining whether the Congress intended the NMB to have the duty to decide jurisdictional disputes, such as the present dispute between the BLE and the BLF&E, under Section 2 Ninth. There is specific legislative history to that effect, and neither the BLF&E nor the NMB even suggests that there is any legislative history to the contrary. Section 2 Ninth was added by the 1934 amendments to the statute (48 Stat. 1185). Those amendments were drafted by Joseph B. Eastman, then the Federal Coordinator of Transportation, and he made entirely clear that Section 2 Ninth would empower the NMB to decide jurisdictional disputes such as we have here.

Thus, in the Hearings on H.R. 7650 before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., at 45, the following colloquy occurred after Commissioner Eastman was asked whether the phrase "craft or class" as used in Section 2 Fourth was defined in the bill:

> "Commissioner EASTMAN: No. We thought of that, as to whether or not it was necessary to define craft or

class, but those are words which have been used in labor parlance for a very long time, and I think there would be no difficulty in determining what is a craft or class of employees.

"Mr. WOLVERTON: You do not think that without definition they might create disputes between the different classes of employees as to the jurisdiction of each?

"Commissioner EASTMAN: No; and if there are any disputes I think that matter is sufficiently covered by the provisions of the ninth paragraph, which provides for the settlement of such disputes, or rather, provides the tribunal which shall have power to consider and determine such disputes."

This matter was raised again shortly thereafter (*id.*, at 57), as follows:

"Mr. HUDDLESTON: How would we resolve an issue where there was a conflict of jurisdiction as to classes and crafts, such, for illustration, as comes up in the classification of employees. We have had some pretty bitter disputes, we will say, between the carpenters and the sheet-metal workers over who should put in metal window frames. That is just an illustration of what sometimes happens, and the trouble has been that nobody could say whether the man doing that work was a carpenter or a sheet-metal worker. What would you do with a situation such as this under this bill?

"Commissioner EASTMAN: It is the intent that that would be handled under the paragraph ninth that I have discussed."

As the above quoted legislative history demonstrates, the Congress wanted to know whether a method was provided for settling disputes between unions as to which had "jurisdiction" to represent a particular group of employees. The

draftsman of the bill assured the Congress that Section 2 Ninth endowed the NMB with "power to consider and determine" "any disputes" which might arise in that regard. Among the kind of jurisdictional disputes specifically mentioned was one very similar to the present dispute between the BLE and the BLF&E as to which union has jurisdiction to represent apprentices training to become locomotive engineers. Congressman Huddleston inquired about a conflict as to the "classification of employees" as coming within the "jurisdiction" of one union or another, such as might occur "between the carpenters and the sheet-metal workers" as to which union should have jurisdiction over the men who "put in metal window frames;"[30] and, Commissioner Eastman replied that "that would be handled under " Section 2 Ninth.

In short, both the "general objectives" of the Act and specific legislative history support the conclusion by the Sixth Circuit and by Judge Sirica that the NMB should decide under Section 2 Ninth the dispute between the BLE and the BLF&E as to which union has jurisdiction to represent apprentices training to become locomotive engineers, and that conclusion is compatible with the language of Section 2 Ninth. That conclusion also is supported by other judicial decisions.

3. *Other judicial decisions.* In *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336 (1943), the Supreme Court stated:

> "It is clear from the legislative history of § 2, Ninth, that it was designed not only to help free the unions

[30] Contrary to the assertions by the NMB (Br., 25-26), it seems clear that Congressman Huddleston was not referring to a work assignment dispute. He did not refer to conflicting claims under the agreements of the two unions, but whether "the man doing that work was a carpenter," so as to come within the carpenters craft, "or a sheet-metal worker," so as to come within the metal workers craft. In any event, he made clear that the instance he specified was only illustrative of his general question as to how the bill "would resolve a conflict of jurisdiction as to classes and crafts. . . ."

> from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees."

And, in a footnote (10) to that statement, the Court said:

> "This is made clear by Commissioner Eastman, the draftsman of the 1934 amendments, in his testimony at the hearings. See Hearings, Committee on Interstate and Foreign Commerce, House of Representatives, 73d Cong., 2d Sess., on H.R. 7650, pp. 39-41, 45, 57-58, 59."

The testimony by Commissioner Eastman thus cited includes the portions quoted above.

The *M.-K.-T.* case also involved a jurisdictional dispute between the BLE and the BLF&E. The Supreme Court held in that case that the courts do not have jurisdiction to decide such disputes. The Court was not required to and did not decide definitely whether the NMB has jurisdiction to decide such disputes under Section 2 Ninth, but it strongly suggested that the NMB has such jurisdiction as the above quotations indicate. So, too, the Court stated (*id.*, at 336-337) that:

> "However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others."

We submit that it is even more difficult to believe that the Congress intended to except some jurisdictional disputes from Section 2, Ninth, so that they could not be resolved by either the courts or the NMB.[31]

The Supreme Court's view that the NMB possesses wide authority under Section 2 Ninth to decide jurisdiction disputes between unions also is indicated by its opinion in *Switchmen's Union* v. *Board,* 320 U.S. 297 (1943), decided on the same day as the *M.-K.-T.* case. In holding that certificates issued by the NMB under Section 2 Ninth are not subject to judicial review, the Court accorded great weight to Commissioner Eastman's explanation of that section, and stated (*id.,* at 302), among other things, that the section:

> ". . . was introduced into the Act in 1934 as a device to strengthen and make more effective the processes of collective bargaining. . . . It was aimed not only at company unions which had long plagued labor relations . . ., but also at numerous jurisdictional disputes between unions."

In *Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952), the Supreme Court held that the courts had juris-

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[31] In its footnote 11 to the last-quoted passage, the Court noted that: "It is apparently the view of the National Mediation Board that § 2, Ninth, was designed to cover only those disputes entailing an election by employees of their representatives. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F.2d 780, 782." The Court did not, however, approve that apparent "view" and its reliance upon the testimony by Commissioner Eastman to support its statement that Section 2 Ninth "was designed . . . to resolve a wide range of jurisdictional disputes" indicates that the Court did not share such a restricted "view" of the Board's authority. This is indicated also by footnote 12 to the same passage, in which the Court took the trouble to note that the case did not present the issue of whether "judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it by 2, Ninth, and, if so, the type or types of situations in which it may be invoked. . . ." We show at pp. 72-73, *infra,* that it has since been established that judicial power may be invoked to compel the NMB to perform its duties under Section 2 Ninth.

diction to determine the validity of an agreement between a carrier and the BRT whereby brakemen represented by that union would replace "train porters," because that issue turned upon the racially discriminatory nature of the agreement and could not "be resolved by interpretation" of the agreement "so as to give jurisdiction to the" NRAB or "hinge on the proper craft classification of the porters so as to call for settlement by the National Mediation Board under our holding in" the *Switchmen's Union* case. Subsequently, the "train porters" brought an action to require that they be included within the brakemen's craft. In affirming a dismissal of that action, the Eighth Circuit stated that: "We have every reason to believe that the Mediation Board, upon proper petition, would exercise its jurisdiction and competently determine any dispute" between the train porters and the Brotherhood of Railroad Trainmen as to whether the train porters should be included within the craft represented by that union. *Howard* v. *St. Louis-San Francisco Railway Company*, 361 F. 2d 905, 909 (8th Cir., 1966). The Eighth Circuit also made clear that the "petition" to which it referred was one "under Section 2, Ninth, of the Railway Labor Act." *Ibid.*

In *Southern Pacific Co.* v. *Switchmen's Union of North America*, 356 F. 2d 332, 335 (9th Cir., 1965), where the Ninth Circuit held that a carrier was not required to bargain about a Section 6 notice intended to obtain for one union jurisdiction already belonging to another, the Court pointed to Section 2 Ninth as the appropriate means for obtaining a determination of the dispute between the two unions: "That section, in providing for the certification of bargaining representatives, would seem necessarily to encompass the essential preliminary steps of fixing craft lines and of resolving any inter-union disputes in that respect."

Finally, we believe that *Transportation Union* v. *U.P.R. Co., supra*, illustrates the Supreme Court's view that the

language of the Act should be broadly construed so as to provide a means for fair and expeditious settlement of inter-union jurisdictional disputes. Although Section 3 of the Act did not in terms provide for tri-partite proceedings before the NRAB and *dicta* in a prior Supreme Court opinion seemed to approve the NRAB's long-established practice of refusing to consider in one proceeding the conflicting claims of two unions that their respective contracts applied to certain work, the Supreme Court concluded that by so doing "the Board abdicates its duty to settle the entire dispute." In the view of the Court, the "railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written, are entitled to have a fair, expeditious hearing to settle disputes of this nature." See p. 52, *supra.*

We submit that "the railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written," also "are entitled to have a fair, expeditious hearing to settle" inter-union jurisdictional disputes like the present dispute between the BLE and the BLF&E, and that a proceeding before the NMB under Section 2 Ninth is the means chosen by the Congress for settling such disputes which are based upon a drawing of craft lines rather than upon an interpretation of two existing agreements. For the NMB to proceed with mediation of the Section 6 proposals by the BLF&E without determining the underlying jurisdictional dispute would lead to a breakdown of the procedures of the Railway Labor Act and leave judicial intervention or economic warfare as the only remaining alternatives. The instant case, like the *Transportation Union* case, "aptly illustrates why the Board cannot judge one-half of a problem while closing its eyes to the other half." Stewart, J., concurring in *Transportation Union* v. *U.P.R. Co.*, *supra,* at 166.

4. *Arguments by the NMB and BLF&E.* We have responded to some of the arguments by Appellants and others are too trivial to merit response without unduly lengthening this brief. We discuss here those arguments that remain.

We have referred to the principal argument by the NMB in its brief to the effect that a dispute as to whether the BLE or the BLF&E has jurisdiction to represent apprentices training to become locomotive engineers, cognizable under Section 2 Ninth, cannot arise until apprentices are actually employed. Otherwise, according to the NMB, no "employees" exist for purposes of satisfying the requirement that a "dispute shall arise among a carrier's employees. . . ." We have pointed out that, if that interpretation is accepted, there also are no "employees" until apprentices are actually employed for purposes of the requirement in Section 6 that notices be served by "representatives of the employees," so that the BLF&E's Section 6 notices involved here undoubtedly are invalid and non-bargainable if that interpretation of the Act is accepted. Finally, we stated that such an interpretation makes considerable sense as a practical matter if applied consistently to Section 2 Ninth, Section 6 and the other provisions of the Act relating to the duty to bargain over Section 6 notices. See pp. 34-37, *supra*.

We note that both the BLE and the BLF&E do represent "employees," even on carriers where there are no apprentices, and are making their respective claims on behalf of those employees, at least in a legal sense. In other words, legally speaking the individuals employed as engineers and the individuals employed as firemen are claiming that the apprentices should be included within their respective crafts. And, as we have shown, the language of the statute should be interpreted in the light of the legislative purpose however "clear" or "unambiguous" it may be on its face.

But, in any event, this argument by the NMB does not support its dismissal of the Section 2 Ninth application filed by the BLE with respect to apprentices on the L&N. Apprentices were employed by the L&N when that application was filed, and the L&N continues to employe apprentices training to become locomotive engineers. The L&N has recognized that such apprentices come within the craft of locomotive engineers and has entered into an agreement with the BLE as the representative of that craft concerning the wages to be paid to the apprentices, the BLF&E has attacked the validity of that agreement on the ground that it has jurisdiction of the apprentices as representative of the fireman's craft, and the Sixth Circuit has held that the NMB has exclusive jurisdiction to decide the dispute between the two unions. See pp. 36, 48, 54-56, *supra*.

The NMB also states in its brief (pp. 20-21) that "where it has appeared that only a small group of individuals, clearly within existing crafts, and insufficient in number to alter the representation of any existing crafts, is involved, and where there is no challenge to existing craft lines it has long been the practice of the NMB to dismiss the application for its services under § 2, Ninth." We do not see why the number of the employees involved should affect their right to participate in the determination of their representative. Certainly, Section 2 Ninth does not purport to make any such distinction. But however that may be, the NMB has not found either that the number of employees involved here is "small," or that they "clearly" come within one or the other of the "existing crafts," or that, if they do, there is "no challenge to existing craft lines. . . ."[32]

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[32] "The Courts may not accept appellate counsels' *post hoc* rationalizations for agency action; *Chenery* requires an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself. . . ." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169 (1962).

And, whatever "small" may mean in this context, there cannot be any doubt about the fact that there is a *bona fide* dispute between the BLE and the BLF&E as to which union has jurisdiction to represent apprentices training to become locomotive engineers, based upon a "challenge" as to what constitutes "existing craft lines."

Both the brief for the NMB (pp. 22-23) and the brief for the BLF&E (pp. 40-41) rely upon the decision in *Brotherhood of R. Trainmen* v. *National M. Board,* 77 App. D.C. 264, 135 F. 2d 790 (1943). The NMB says that that decision "not only would require that there be an actual dispute among employees who could fall within one class or another, but that also such dispute might result in a change in the representative of an existing class or craft, before § 2, Ninth, could be invoked." The BLF&E says that the case establishes that "the Mediation Board has no power to determine or resolve a jurisdictional dispute as such." The Supreme Court, in the *M.-K.-T.* case, cited the *Trainmen* case for the proposition that it "is apparently the view of the National Mediation Board that § 2, Ninth, was designed to cover only those disputes entailing an election by employees of their representatives." 320 U.S., at 336, fn. 11. This is also what both the NMB and the BLF&E contended the *Trainmen* case to stand for in the court below, and what we understand their present arguments to mean despite the circumlocutions which they employ. In short, as we understand it, the argument comes down to this: There is no doubt that the BLE is the choice of the engineers as their representative or that the BLF&E is the choice of the firemen as their representative, and this will continue to be true regardless of whether the apprentices are included in the craft of engineers or included in the craft of firemen. Hence, there is no necessity for an election and the NMB can delineate craft lines *only* in determining the employees who may vote in an election. The NMB concedes (Br., at

38-39) that this argument is at least questionable when a work assignment dispute within the jurisdiction of the NRAB is not involved, as here, and we think it is without any merit.

There are several answers to such an argument. First, as we have already noted (fn. 31, p. 62, *supra*), the Supreme Court in *M.-K.-T.* did not approve the view thus "apparently" held by the NMB, and indicated that it held a contrary view. Second, Section 2 Ninth empowers the NMB not only "to take a secret ballot of the employees involved" but also to "utilize any other appropriate method of ascertaining their duly designated and authorized representatives. . . ." Third, legislative history and the course of decisions since the *Trainmen* case was decided support a broader interpretation of Section 2 Ninth (see pp. 54-64, supra). Fourth, this Court in *Trainmen* regarded the dispute as a work assignment dispute "whether the particular work is to be done by employees within one craft or class or another." 135 F. 2d, at 782. Fifth, however regarded, the decision by the NMB in fact settled that dispute. One union requested the NMB to rearrange craft lines so as to include within its craft work which all had previously agreed was to be performed by another craft. By dismissing the application, the NMB resolved the dispute by leaving the craft lines as it found them. Here, of course, there is no agreement as to existing craft lines insofar as jurisdiction of apprentices training to become engineers is concerned. Sixth, the NMB itself has distinguished its decision in the *Trainmen* case, and has refused to follow that decision in a situation where existing craft lines are disputed rather than conceded.[33]

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[33] *Matter of Representation of Employees of the Chicago, North Shore and Milwaukee Railroad Company, Etc.*, 3 NMB Craft or Class Determinations 101 (1953). In that case, two unions claimed that "ticket sellers" and various other groups of employees came within their respective crafts.

Finally and conclusively, we believe, the mere fact that the outcome of an election is reasonably predictable does not mean that an election cannot be held, if an election is thought to be a prerequisite to a determination under Section 2 Ninth of a jurisdictional dispute between two unions. For example, in the proceeding described in fn. 33, p. 68, *supra,* the real issue was determining the craft in which the ticket sellers, etc., were to be classified; there is no indication that the NMB in ordering an election thought that there was any substantial doubt that the union then representing the victorious craft would prevail in such an election and it ordered an election so as to give the included groups an "opportunity" to vote which they had not previously had. So, too, in the "crew complement" controversy, to which reference has already been made (pp. 27-29, *supra*), when the NMB was requested to determine under Section 2 Ninth whether the pilots and flight engineers crafts on United Airlines should be merged, the outcome of an election if such merger was approved surely was predictable, and in fact the union which had represented the pilots craft won by a vote of 1682 to 58. *UNA Chapter, Flight Eng. I. Ass'n* v. *National Mediation Bd.,* 111 U.S. App. D.C. 121, 294 F. 2d 905, 907 (1961).[34] In short, if the NMB thinks it necessary to

"The issue to be determined . . . is the proper classification of ticket agents, ticket sellers," etc. *Id.,* at 102. The NMB determined that they came within the craft of clerical employees and ordered an election because the ticket sellers, etc., had not previously had an opportunity to vote in the selection of the existing representative of that craft. *Id.,* at 110-111. In so ruling, the *Trainmen* case was distinguished as follows: "In the Trainmen's case, the dispute revolved around the right of those in one class or craft to do the work which was acknowledged to be that of another craft or class. In the present dispute there is no concession on the part of the organizations that the classifications of Ticket Agents, Ticket Sellers, Baggagemen, Baggage Agents, Information Clerks and Gatemen are outside the scope of the craft or class they represent." *Id.,* at 108.

[34] Unanimous, or nearly unanimous, votes in Section 2 Ninth elections are not infrequent. A recent example is *Matter of Representation of Employees of Albany & Northern Railroad Co., Etc.,* Case No. R-4031 (August 8, 1968), where a union received the votes of all members of the craft.

conduct an election participated in by all engineers (or firemen) on a carrier in order to determine that apprentices training to become engineers are members of that craft, there is no reason why it cannot do so.

Finally, the NMB argues in its brief (pp. 27-44) that a determination of the jurisdictional dispute between the BLE and the BLF&E, under Section 2 Ninth, should await the completion of negotiations between the BLF&E and the carriers on the Section 6 notices served by the BLF&E.[35] This argument is akin to the prematurity argument by the BLF&E, which we have already refuted (pp. 43-44, *supra*). All the arguments made by the NMB in that regard fail to take account of the fact that an apprentice training program already has been established on the L&N (and also on the Great Northern). The terms of that program, the "work" performed by the apprentices and all other details have been fixed, either by agreement with the BLE or by the exercise of managerial discretion in a manner which has not been challenged by the BLE. Surely, it cannot be the law that the carriers must agree to two inconsistent apprentice programs—one with the BLE and one with the BLF&E—before the NMB can determine which union is the "true representative" of the apprentices. The functions of the NMB, even in mediation, do not include a determination of what agreement should be made between a union and a car-

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Moreover, the NMB has made craft or class determinations in the course of dismissing a Section 2 Ninth application after an investigation, as where it is found that the application relates to only a part of the proper craft. *E.g., Matter of Representation of Employees of the National Airlines, Etc.*, 1 NMB Craft or Class Determinations 423, 439-440 (Nos. R-1718, R-1720, R-1729; 1947); *Matter of Representation of Employees of the New York Central Lines, Etc.*, 1 NMB Craft or Class Determinations 77, 79 (1938).

[35] This argument, like many others made by counsel for the NMB, are "appellate counsels' *post hoc* rationalizations for agency action" which were not articulated by the NMB itself in dismissing the BLE's Section 2 Ninth applications. See fn. 32, p. 66, *supra*.

rier, much less a determination of which union has made the "best" of two conflicting agreements.[36]

If a determination is made that the BLF&E has jurisdiction to represent apprentices training to become locomotive engineers, a dispute may arise between the *BLF&E and the carriers* as to whether an apprentice training program should be established and what its details should be. But, the jurisdictional dispute between the *BLE and the BLF&E* does not concern those issues. Their dispute is over which union has jurisdiction to represent the apprentices in collective bargaining intended to establish such a training program and its details. The BLE contends that it is unlawful for the carriers to bargain, much less agree, with the BLF&E about the merits of such a program, and the carriers have refused to bargain with the BLF&E about the merits of its Section 6 notices and have made clear their intention to continue to do so unless and until a determination is made that the BLF&E does in fact have jurisdiction to represent the apprentices. Hence, the delay envisaged

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[36] See, *e.g.*, *Terminal Assn.* v. *Trainmen*, 318 U.S. 1, 6 (1943); *Virginian Ry.* v. *Federation*, 300 U.S. 515, 548 (1937). As the *Virginian Railway* case, among others, demonstrates, the NMB can and has certified unions under Section 2 Ninth which had not previously bargained or agreed with the carrier. Moreover, the NMB has stated where agreements purport to "add various classifications of workers to [a union's] coverage (or subtract various classifications)", it "cannot be said that the agreements recognized and maintained a craft or class of employees which by custom, practice and bargaining has been established as such." To rely upon the agreements in such circumstances in drawing craft lines could mean that "the craft or class of employees would vary with each agreement," and the "term craft or class as used in the Railway Labor Act clearly refers to something much more definite." *Matter of Representation of Employees of the Chicago, Aurora & Elgin R. Co., Etc.*, 1 NMB Craft or Class Determinations 282, 284 (1943). "Further, the right of selection of representatives by each craft or class is quite independent of any existing agreement. No limit is placed in the law upon the right of a craft or class to select its representative and that right cannot be limited or curtailed by any existing agreement." *Matter of Representation of Employees of the Oklahoma Railway Co., Etc.*, 1 NMB Craft or Class Determination 35, 39 (1939).

by the NMB will accomplish nothing fruitful and may result in devastating strikes by the BLE, the BLF&E, or both. We submit that such an abdication by the NMB of its duty to settle jurisdictional disputes when they arise, such as the dispute between the BLE and the BLF&E, was not and could not rationally have been intended by the Congress. It has no support in the language or legislative history of the Act, in prior decisions by the courts or, insofar as we have been able to discover, in prior decisions by the NMB.

C. *The NMB May Be Compelled to Perform Its Duty to Decide the Dispute between the two Unions.*

We do not understand either the NMB (Br., at 1-2, 45-47) or the BLF&E (Br., at 1-2, 50-53) to question in this Court the order by Judge Sirica that the NMB determine the jurisdictional dispute between the BLE and the BLF&E, pursuant to the Section 2 Ninth applications filed by the BLE, if this Court agrees with Judge Sirica's conclusion that the NMB has the duty under Section 2 Ninth to determine that dispute. In any event, it is now clear that the courts do have the power to require the NMB to perform its duties under Section 2 Ninth. While that issue was reserved in the *M.-K.-T.* case (320 U.S., at 336, fn. 12), the Supreme Court decided that such power exists, in *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650, 661 (1965). This Court had previously reached a similar conclusion in *Air Line Dispatchers Ass'n* v. *National Mediation Board,* 89 App. D.C. 24, 189 F. 2d 685 (1951).

The NMB does contend (Br. 45-47) that the Court should give "great deference" to the NMB's "expertise." We believe that contention to be sufficiently answered by the following quotation from *Labor Board* v. *Brown,* 380 U.S. 278, 291-292 (1965):

> "Courts should be 'slow to overturn an administrative decision' . . ., but they are not left 'to sheer acceptance

of the Board's conclusions'. . . . Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' "

## Conclusion

For the reasons stated above, the decision by the District Court should be affirmed.

Respectfully submitted,

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## APPENDIX

*Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.)*

### Definitions

Section 1. When used in this Act and for the purposes of this Act—

* * * * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) * * *

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * *

### General Purposes

Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

### General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable

effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing

any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be con-

strued to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by

the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the

performance by an individual employee of such labor or service, without his consent.

* * * * *

NATIONAL BOARD OF ADJUSTMENT; GRIEVANCES; INTERPRETATION AGREEMENTS

SECTION 3. First. There is hereby established, a Board to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

FUNCTIONS OF MEDIATION BOARD

SECTION 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party,

or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * * *

EMERGENCY BOARD

SECTION 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President,

no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

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(5907-1)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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NO. 22,050

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Appellant,

v.

Nat. Med. Bd.
~~BROTHERHOOD OF LOCOMOTIVE ENGINEERS~~, ET AL.,

Appellees.

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NO. 22,185

---

NATIONAL MEDIATION BOARD

Appellant,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,

Appellees.

---

PETITION BY APPELLEE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR REHEARING

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PETITION BY APPELLEE BROTHERHOOD OF LOCOMOTIVE ENGINEERS FOR REHEARING

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Appellee Brotherhood of Locomotive Engineers, under and pursuant to Rule 40 (a) of the Federal Rules of Appellate Procedure, respectfully petitions this Court for rehearing of its opinion filed on March 14, 1969, which reverses the judgment and sets aside the orders of the United States District Court for the

District of Columbia in the above styled matters. The ground relied upon by appellee is that this Court has overlooked or misapprehended certain points of law and fact applicable thereto and, as a result, the opinion and mandate require clarification as to circumstances of substantial and controlling importance and effect.

STATEMENT IN SUPPORT OF PETITION

As BLE reads the decision of this Court as embodied in the principal opinion, the basic decree issued by the District Court herein is vacated because (1) it improperly relieved the carriers of their duty to bargain over the Firemen's notices relative to apprentice locomotive engineers and (2) it improperly ordered the Mediation Board to determine the bargaining representative for apprentice engineers since the Board lacks jurisdiction under section 2, Ninth of the Railway Labor Act to make that determination. Further, the decision would set aside the District Court's order enjoining the Firemen from engaging in a threatened strike on the Great Northern as being in violation of the basic decree entered by the lower court. Although the two concurring judges agree that the Mediation Board lacks jurisdiction under the Act to resolve the dispute, a perusal of the concurring opinion fails to establish absolute bargainability on the Firemen's apprentice engineer notices in their entirety. And, as we view the latter opinion, there is no indication that the injunction against the Firemen's threatened strike could not be sustained on other grounds. However, contrary to our reading of the expressions of the majority of the Court, the mandate in the

principal opinion fails to provide for remand to the District Court to determine those provisions in the Firemen's notices that are bargainable and for adequate instructions to the District Court pertaining to the appropriateness of injunctive relief in the Great Northern situation upon an adequate showing of other legal grounds in support thereof. In view of the apparent inconsistencies between the two opinions, it is suggested that the decision and mandate should be reheard and clarified in the above respects.

At the outset, it should be noted that the basis of the principal opinion stems from the belief that the Firemen's organization and its craft were severely dealt with by the carriers in the matter involving Arbitration Award 282; that, therefore, the Firemen have an interest in job security or economic protection for firemen; and that, for this reason, Firemen's Notice No. 3, the apprentice engineer notice, is fully bargainable. In effect, the principal opinion feels justified in permitting the Firemen to bargain on the length of training and seniority for engineers, matters normally considered as solely relating to the engineers' craft. By adopting this approach, it would appear that the principal opinion perceived the actual controversy as between the carriers and the Firemen over fireman manning, when in fact the adversaries here are the Engineers and Firemen as to representation rights, or craft delineation, from which flows the bargaining rights for apprentice engineers. It would seem to BLE that collective bargaining rights arise from representation rights and not the converse as the principal opinion indicates. But by doing so the principal opinion is very charitable in regard to the sphere of bargaining authority for the Firemen. On the other

hand, the principal opinion becomes quite chary as to the Engineers' bargaining authority or representation rights for its craft.

In short, the principal opinion views permitting Firemen to bargain on the subject of apprentice engineers not to derogate from the Engineers' status as the certified representative of locomotive engineers because Firemen have an interest in the promotional rights of firemen into the craft of engineers. Assuming this interest exists, the principal opinion errs in correlating two distinct and separate subjects (promotion rights and apprentice engineers), one bargainable and the other not by BLF&E, and then improperly assumes that Firemen can negotiate on subjects within the sole purview of the Engineers as craft representative, such as engineers' seniority, tenure and ranking of engineers, and regulation of assignments in the engineers' craft. If, as the principal opinion intimates, Firemen may bargain on such subjects in the context of its apprentice engineer notices, BLE's status of craft representative for engineers is derogated. As we see it, the Firemen's jurisdiction is limited to the threshold of entry into the Engineers' craft. To that extent, at least, BLE does have a section 2, Ninth certification which is not dependent upon further Mediation Board action and which cannot be infringed. And paraphrasing the Fifth Circuit, BLE is the exclusive bargaining agent covering engineers' work and represents all who do that work whether members of BLF&E and whether normally working in the craft of firemen; and to the extent BLF&E would be permitted to confer, negotiate and bargain with the carriers to assure continuation of such work or any other supposed fair share of it, BLE would not be the exclusive bargaining representative for all in its craft. Order of Ry. Conductors & Brakemen v. Switchmen's Union, 269 F. 2d 726 (5th Cir. 1959);

cert. denied, 361 U. S. 899 (1959).

The expressions contained in the principal opinion on the above point are also based on several incorrect findings. First, the BLE's apprentice agreements do not infringe on the promotional rights of existing firemen into the Engineers' craft. For example, as shown by the attached appendix which is a part of the BLE-L&N apprentice agreement, provision has been made to permit firemen when properly promotable to assume their relative position in the craft of locomotive engineers. In short, a seniority date as engineer has been reserved for each present fireman so that he will not be run around as an engineer. On the other hand, an apprentice upon receiving seniority as an engineer will never have seniority ranking in the craft of firemen above any present firemen. The only reason he gets a fireman's date is a result of the Firemen's Schedule Agreement, not any doing of the Engineers. And under our view of the law expressed above, the Firemen could remove that provision at any time it desires.

Second, the principal opinion cites the Chicago Joint Agreement, abrogated over forty years ago, and certain promotional rules in BLF&E's schedule agreement with the St. Louis Southwestern as indicative of the Firemen's interest in apprentice engineers. However, there was a failure to refer to other provisions in that agreement providing that where firemen are required to fire three years, as they are, one engineer may be hired to every fireman promoted. Thus, under the narrowest construction of these provisions, at least one-half of the carriers' needs for engineers may be achieved by direct hiring into the craft of engineers through BLE's apprentice program.

Third, the principal opinion assumes that the Firemen merely wanted to concurrently bargain on the subject of apprentice engineers. The L&N suit belies this position because there BLF&E moved to set aside BLE's agreement as null and void under the theory that BLF&E had the exclusive bargaining rights over apprentices and other matters relating to the craft of engineers.

In addition, the principal opinion points to the 1960 joint proposal of BLE and BLF&E to the Presidential Railroad Commission as indicative of the Firemen's interest. It is difficult to ascertain the basis on which that proposal establishes bargaining or representation rights for the apprentices in BLF&E. Contrary to the statement in the principal opinion, however, a review of the proposal shows that during the first three years of the program, "the trainees were to be known as 'locomotive helpers' (another name for firemen)," and within the craft of firemen. During the fourth year, they were to be apprentice engineers and within the engineers' craft (JA 141). Instead of bolstering the Firemen's position, the theory of that proposal supports the claim of the Engineers' as to craft delineation.

On the other hand, the concurring opinion appears to have appropriately rejected the theory of the principal opinion on all three of the underlying bases. On this specific point, the concurring opinion initially states that the obvious legislative intent of Arbitration Award 282 has not lost its vitality. In other words, it would not appear that the concurring opinion would permit BLF&E through its notices on apprentice engineers to engage in its fight against ultimate craft extinction by transgressing the existing craft lines of engineers and at the expense of BLE. See Southern Pacific Co. v. Switchmen's Union, 356 F. 2d 332 (9th Cir. 1966). As a result, the concurring opinion limits the bargainable interest "of the Firemen solely to the effect and not the internal structure of the

apprentice programs" and finds the primary interest of Firemen "to ensure that their promotional rights are not impaired by having graduate apprentices supersede existing firemen in their quest to become engineers." Thus, unlike the principal opinion, the concurring opinion indicates that the Firemen's bargainable interest in apprentice engineers is limited to the "effect" on the firemen's craft, and it follows that the Firemen's notices are not entirely bargainable. Nevertheless, the concurring opinion finds that the Court is "not called upon now to define [the] scope" of the Firemen's bargainable interest.

In light of the above discussion, it is clearly indicated that the following two factors raised by the principal opinion need to be clarified and more desirably should be reheard:

1) If, as we read the opinion of the two concurring members of the Court, the bargainable interest of the Firemen is solely limited to the effect of the BLE apprentice programs on the promotional rights of existing firemen, should not the Court remand to the District Court to consider the extent of the bargainability of the Firemen's outstanding notices?

2) If BLE may validly enter into apprentice engineer agreements, as the Court appears to hold, should not the vacation of the preliminary injunction issued by the District Court against the Firemen's threatened strike on the Great Northern be without prejudice to injunctive relief on other grounds, such as, but not limited to, an alleged strike for the purpose of preventing the effectuation of BLE's valid agreement as to which BLF&E has a remedy under section 3 of the Act to determine whether said agreement improperly denies firemen of their promotional rights into the craft of engineers under the interpretation and application of the respective bargaining agreements.

As to the first point, the majority of the Court seems to have merely rejected the ruling of the District Court that BLF&E's notices were non-bargainable unless and until BLF&E was determined by the Mediation Board to be the authorized representative of apprentice engineers. While not defining the scope of the Firemen's "bargainable interest", the two concurring judges establish that the Firemen's bargainable interest is solely confined to the effect of the apprentice programs on the promotional rights of firemen into the craft of engineers and not to the internal structure of an apprentice engineer training program or to matters within the bargainable interest of BLE. However, BLF&E's notices were directed to the "internal structure" of the apprentice engineer training program and, in fact, to matters within the exclusive bargaining domain of the Engineers. In sum, the outstanding notices of the BLF&E set up the qualifications and methods of selection for apprentice engineers, the term and training of apprentice engineers, and an administrative committee on which BLF&E, and not BLE, would be represented. Of even greater import to BLE, all engineers would be required to come from the BLF&E apprentice engineers program, the firemen would regulate assignments into and within the craft of engineers, and the firemen would determine and assign the seniority and ranking of apprentices in the craft of locomotive engineers.

As the principal opinion succinctly points out, questions of bargainability are to be decided by the courts. (Opin. p. 9, n. 16). See also Southern Pacific Co. v. Switchmen's Union, supra; Order of Ry. Conductors & Brakemen v. Switchmen's Union, supra.

Although the District Court found the notices to be non-bargainable in their entirety until the Mediation Board made a determination, BLE's complaint alleged that the Firemen's notices were non-bargainable to the extent that they required the carriers to bargain with BLF&E, and not BLE, as to those matters exclusively within the craft of engineers (JA. 7-9; 13-14) and requested that the lower court declare said notices to be invalid and of no legal force and effect and to enjoin BLF&E and the carriers from bargaining on those subjects therein within the craft jurisdiction of BLE (JA. 15). In addition, the carriers in their cross-claim asked the court to adjudge and declare the extent of bargainability of the subject matter contained in the involved notices (JA. 49).

Under these circumstances, it is submitted to the Court that the mandate should be clarified and that the case should be remanded to the District Court for further consideration of the bargainability issue in light of this Court's opinions and the pleadings herein.

As to the second point, there appears to be little doubt in either the principal or concurring opinions about the right of the BLE to bargain and agree with the Great Northern as to the terms and conditions of work for apprentices in the craft of locomotive engineers. Further, the indication in the concurring opinion that BLF&E's bargainable interest is limited to the effect and not the internal structure of the apprentice engineer programs establishes the right of BLE to bargain and agree with the Great Northern as to "the internal structure of the apprentice programs." As previously noted, the BLE's apprentice agreements on the L&N and the Great Northern do not affect the rights of firemen to promotion to engineer nor their assignments within the craft of locomotive firemen. All these agreements did were to establish a supplemental means to satisfy the need for engineers and to establish the apprentices' seniority and other conditions of employment in the craft

of locomotive engineers. It is, therefore, unquestionably clear from the rationale of the decision that Great Northern's apprentice agreement with BLE is valid. If, as the facts indicate, BLF&E's threatened strike on the Great Northern was for an illegal purpose, i.e., to cause the carrier to abrogate its valid agreement with BLE, that threatened strike would be illegal and could be enjoined. Additionally, as the principal opinion points up in regard to BLE, there may be a remedy to resolve that dispute under section 3 of the Act (Opin. p. 9, n.15). If this is true in regard to BLE, this remedy would also be available to BLF&E and the latter should also be required to follow that course. See Transportation-Communication Employees Union v. Union Pacific Co., 385 U. S. 157 (1966); Slocum v. Delaware, L & W R. Co., 339 U. S. 239 (1950); Order of Ry. Conductors v. Pitney, 326 U. S. 561 (1946).

It appears merely that the lower court granted the involved injunctive relief on the grounds of its basic decree and, therefore, was in error. As shown, nevertheless, BLF&E's self-help measures can be enjoined on, at least, either of the two mentioned grounds. It has not exhausted the procedures of the Act with respect to the handling of its apprentice notices under the major disputes provisions of the Act. Brotherhood of Locomotive Engineers v. Baltimore and Ohio R. Co., 372 U. S. 284, 290-291 (1963); Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 722-728 (1945). Or it can be enjoined from engaging in self-help procedures as to BLE's agreement for in that respect it is required to follow the "minor" disputes provisions of the Act. Brotherhood of Railroad Trainmen v. Chicago River & R. R. Co., 353 U. S. 30 (1956).

The reasoning contained in the Court's decision does not indicate otherwise than that the injunctive relief in regard to the Great Northern situation could not be enforced on the basis submitted by the lower court. If, contrary to this belief, the court did intend to foreclose the issuance of injunctive relief on other grounds, it places BLE - and also the Great Northern as we see it - in an untenable position. On the one hand, though BLE's agreement would be valid, it would be of no value as a practical matter. On the other hand, as the principal opinion sees it, the Firemen may bargain and enter into valid agreements with the carriers on the subject of apprentices, and BLE's, remedy, that opinion suggests, is limited to the minor disputes provisions contained in section 3 of the Act. If the court did intend to draw a distinction between the treatment afforded the two unions, it is believed that the matter should be reheard.

## CONCLUSION

For the above reasons, BLE respectfully requests the Court to grant the instant petition for rehearing. In the alternative, BLE submits that this Court should clarify the mandate so as (1) to remand the case for further consideration of the bargainability issue by the District Court in light of this Court's opinions and (2) to permit the issuance of injunctive relief against any strike

threatened by the BLF&E to prevent the Great Northern from complying with its contractual obligations and duties with BLE on grounds other than enforcement of the basic decree vacated by this Court.

Respectfully submitted,

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AGREEMENT BETWEEN THE
LOUISVILLE AND NASHVILLE RAILROAD COMPANY
AND ITS ENGINEERS REPRESENTED BY THE
BROTHERHOOD OF LOCOMOTIVE ENGINEERS

As a result of Civil Action No. 5134, the L. & N. Railroad has been restrained from offering certain firemen opportunity to qualify and/or to accept promotion to the rank of locomotive engineer in the order of their employment as firemen on the Louisville Division, Main Stem First Seniority District. In order to protect the seniority of these employes on the engineers' roster, it is agreed:

The below named firemen will, after having been afforded an opportunity to qualify as engineer in accordance with the February 22, 1941 agreement, and having met the qualifying requirements, and having met the conditions prescribed in the order of October 1, 1965, be placed on the engineers' seniority roster (Main Stem 1st) in the same relative order as had they been placed on that roster on September 15, 1966.

| | |
|---|---|
| E. A. Johnson | W. E. Davenport |
| T. D. Wilson | J. G. Calhoun |
| R. D. Boaz | E. A. Heckel |
| R. L. Livers | T. T. Holsinger |
| A. M. Holden | D. L. Cooksey |
| J. A. Ohnimus | L. E. Crowe |
| D. L. Shallers | W. A. Pierce |
| T. A. Latimer | R. M. Muirheid |
| R. S. Watson | L. Daniels |
| B. A. Turner | J. G. Starrett |
| J. P. Jones | R. Skaggs |
| R. N. Cotton | B. N. Miller |

This Agreement shall remain in effect until all the above-named firemen have had an opportunity to establish a date of seniority as engineer in accordance with the provisions of the Engineers' General Agreement and the above referred to injunction, after which the provisions of Article 26, Hiring and Promoting Rule, will apply.

Signed at Louisville, Kentucky, this 20th day of September, 1966

FOR THE EMPLOYES CONCERNED:

W. E. Stevens
General Chairman, B. of L. E.

FOR THE LOUISVILLE AND NASHVILLE RAILROAD:

W. S. Schall
Director of Personnel

APPROVED:

L. D. Sims
Asst. Grand Chief Engineer

APPENDIX

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Rehearing of Brotherhood of Locomotive Engineers was served by mailing a copy, first class postage prepaid, to each of the following this 27th day of March, 1969: Joseph L. Rauh, Jr., Rauh & Silard, 1001 Connecticut Ave., N.W., Washington, D. C., and Isaac N. Groner, Cole & Groner, 1730 K Street, N.W., Washington, D. C., attorneys for the Appellant Brotherhood of Locomotive Firemen & Enginemen; Walter H. Fleischer, Department of Justice, Washington, D. C. 20530, attorney for Appellant NMB; and Francis M. Shea, Esq., Shea & Gardner, 734 Fifteenth Street, N. W., Washington, D. C. 20005, attorney for Appellee Carriers.

HAROLD A. ROSS

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

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No. 22,050

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Appellant,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
Appellees.

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No. 22,185

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NATIONAL MEDIATION BOARD,
Appellant,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
Appellees.

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# PETITION BY RAILROAD APPELLEES FOR CLARIFICATION OR REHEARING

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PETITION BY RAILROAD APPELLEES FOR CLARIFICATION OR REHEARING

We do not propose in this Petition to repeat arguments we have already made. We request only that the Court clarify its mandate and, if deemed to be necessary or desirable, grant a rehearing for that purpose, so as to reflect unmistakeably what we understand to be the limits of the Court's March 14, 1969 decision on the following matters: 1/

(1) With respect to the bargainability of the apprentice notices served by the BLF&E, the mandate as stated in the principal opinion, unless clarified, may be construed to foreclose the District Court on remand from considering issues going to the bargainability of the BLF&E's Section 6 notices which the concurring majority of the Court would leave open for further consideration.

(2) With respect to the direction that the preliminary injunction issued by the District Court against the threatened strike of the Great Northern be vacated along with the basic decree which it enforced, we suggest that the Court should make entirely clear that such action is without prejudice to an injunction of the threatened strike on other grounds (including grounds made available by this Court's decision).

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1/ In the interest of accuracy, we believe that we also should call the Court's attention to certain mistakes (as we understand the record) in the factual narration contained in the principal opinion. We do not regard those mistakes (if that is what they are) to be so material as to lead to a different result, if corrected, and thus do not urge them as grounds for a rehearing. (1) On page 4 of the slip opinion, it is stated that: "When the carriers did not reply to the Firemen's Section 6 notice, the Firemen sought the mediatory services of the National Mediation Board . . . In fact, the carriers did reply to the effect that in their view the notices were not bargainable (JA 233). (2) With regard to the first full paragraph on page 5 of the slip opinion, the BLF&E's suit against the L&N was brought in the Western--not the Eastern--District of Kentucky, and we do not understand the Sixth Circuit to have included in its decision the reservation "(if indeed it could be decided in any official forum)." Also, we do not understand the Firemen in that case to have "objected to the L&N entering into an agreement with the Engineers before it bargained with the Firemen concerning their similar proposal." Rather, the BLF&E there

I.

Part II of the principal opinion considers the ruling by Judge Sirica that the carriers are not required to bargain over the BLF&E's Section 6 notices proposing an apprentice training program unless and until the NMB determines, in a Section 2 Ninth proceedings, that the BLF&E is the authorized representative of the apprentices. At the conclusion of Part II (Slip Op., at 12-13), the statement is made that:

> "Therefore, we conclude that the Firemen's Section 6 notice concerning engineer apprenticeship programs, served on appellee carriers during 1965, was bargainable under the Railway Labor Act. The National Mediation Board's scheduling of mediation over the notice was proper under Section 5 of the Act. The District Court's order relieving the carriers of their duty to bargain over the notice must be set aside."

Considering the principal opinion alone, we would understand that statement to express the mandate of the Court insofar as the bargainability issue is concerned. But in view of the concurring opinion, it seems clear to us that a majority of the Court did not intend to go so far as to hold that the BLF&E's Section 6 notices are bargainable. Rather, as we understand, the Court simply rejected the basis of the lower Court's holding respecting bargainability, leaving open for further consideration on remand of other matters pertinent to the bargainability issue. Thus, the concurring opinion states (Slip Op., at 18-19):

> "The broad claims of the Firemen concerning the historical connection between their craft and the training of railroad engineers deserves some comment. The Firemen were indeed the

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(Cont'd) contended that the L&N could not validly agree at all with the BLE about an apprentice engineer program. See JA 197-198, 250-251, and Appendices 23 and 24 to the Affidavit of C. J. Coughlin (copies of the complaint filed by the BLF&E and of the findings made by the Western District of Kentucky [neither of which mention the Section 6 notice served by the BLF&E]--which are in the record here but not printed in the Joint Appendix). (3) In footnote 6 on page 5 of the slip opinion, it is indicated that only the L&N and the Southern Pacific applied to the NMB for its mediatory services with respect to the dispute between the two unions. The application (JA 202-207) devotes 3 1/2 printed pages (JA 204-207) to a listing of the carriers on whose behalf that application was filed, comprising all of the carriers served by the BLF&E with its apprentice notices.

> source of most of those who became railroad engineers, but they were the 'pupils,' not the teachers; the engineers trained and taught the firemen so that they could qualify for engineer jobs when available. To what extent this gives the Firemen a 'bargainable interest' in the apprenticeship training program of the Carriers is not clear, but we are not called upon now to define its scope.
>
> "Moreover, if anything is clear from the history which preceded Board 282 it is that due to gradual technological changes the traditional functions of the Firemen had become largely obsolete, but the carriers, shippers and the public were not relieved of the burden of unneeded employees. To remedy this problem Congress created Board 282; after lengthy hearings the Board permitted the carriers to extinguish up to ninety percent of the Firemen's jobs. Although the 282 Award has, by its terms, expired, this Court has recognized that its obvious legislative intent has not thereby lost its vitality. The primary interest of the Firemen at this juncture is to ensure that their promotional rights are not impaired by having graduate apprentices supersede existing firemen in their quest to become engineers. History and logic, then, may well point toward confining the 'bargainable interest' of the Firemen solely to the effect and not the internal structure of the apprentice programs; this is not to say that both of the contending Unions may not have some contribution to make within the framework of their experience." (Emphasis added, except that the word "effect" in the last sentence is emphasized in the original.)

As we understand this statement by the two concurring members of the Court and particularly the passages we have emphasized therein, a majority of the Court does not deem a definition of the "scope" of the "bargainable interest" of the BLF&E in an apprentice training program to be necessary at this time, but suggest that that "bargainable interest" "may well be" confined "solely to the effect and not the internal structure of the apprentice programs . . . ." Clearly, the concurring majority has not determined that the Section 6 notices served by the BLF&E are within the "bargainable interest" of the BLF&E so as to be bargainable under the Railway Labor Act. We respectfully urge, therefore, that the Court's mandate should remand the case to the District Court for further proceedings directed toward a determination of the BLF&E's bargainable interest in the apprentice engineer program it has proposed and, in the light of that determination, to rule upon the bargainability of its Section 6 notice. The mandate should not, as it now appears to do (p. 2, supra), direct the District

Court that that Section 6 notice "was bargainable under the Railway Labor Act" and that the "National Mediation Board's scheduling of mediation over the notice was proper under Section 5 of the Act."

Such a clarification of the Court's mandate is quite important, as a Section 6 notice that goes beyond the "bargainable interest" of the union (or carrier) serving the notice is non-bargainable and the recipient of the notice cannot be required to bargain over that notice (although a new notice within the scope of the union's bargainable interest would, of course, be bargainable).[2/] Brotherhood of Railroad Trainmen v. Akron & B.B. R. Co., 128 U.S. App. D.C. 59, 385 F.2d 581, 599-604 (1967); Southern Pacific Co. v. Switchmen's Union of North America, 356 F.2d 332 (9th Cir., 1965); Order of Railway Cond. & Brake. v. Switchmen's Union, 269 F.2d 726, 730-734 (5th Cir., 1959); Chicago & North Western Ry. Co. v. Order of Rail. Tel., 264 F.2d 254, 258-260 (7th Cir., 1969), rev'd on other grounds, 362 U.S. 330 (1960); Brotherhood of Rail. Train. v. New York Central R. Co., 246 F.2d 114 (6th Cir., 1957); cf., Fibreboard Corp. v. Labor Board, 379 U.S. 203, 209-210 (1964); Labor Board v. Borg-Warner Corp., 356 U.S. 342, 348-349 (1958).

Assuming that the District Court should find, as a majority of this Court suggest may well be done, that the bargainable interest of the BLF&E is limited to the effect of an apprentice engineer program--to insure that the promotional rights of the existing firemen are not impaired by having graduate apprentices supersede them in their quest to become locomotive engineers--and does not extend to the "internal structure of the apprentice programs," there would be little doubt that the Section 6 notices served by the BLF&E are non-bargainable. Those Section 6 notices plainly are directed to "the internal structure" of an apprentice engineer training program. Among other things, they specify (JA 55-69) the qualifications required

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2/ In the language of the statute (45 U.S.C. §156), the bargainable interest of a union is confined to the "rates of pay, rules, or working conditions" of the employees represented by the union.

for applicants and the manner in which they are to be selected, the term of the apprentice program, the general nature of the training to be provided, and the establishment of a joint committee (comprised of representatives of the carriers and the BLF&E, to the exclusion of the BLE) to administer the training program. All newly hired engine service employees would be required to undergo the apprentice training program, and successful graduates would be qualified and given seniority as locomotive engineers.

An ultimate determination that the bargainable interest of the BLF&E (as the representative of the craft of firemen) in apprentice engineer training programs is limited to the extent suggested by the concurring opinion and that, consequently, its 1965 Section 6 notices are non-bargainable would not, of course, prevent the BLF&E from serving new Section 6 notices limited to the "effect" of the apprentice program upon existing firemen and proposing "to ensure that their promotional rights are not impaired by having graduate apprentices supersede existing firemen in their quest to become engineers." We note that the two apprentice engineer programs thus far established--those established by the L&N and the Great Northern in agreement with the BLE--do not impair the promotional rights of the existing firemen and simply provide a supplemental source of locomotive engineers in circumstances where an adequate supply of firemen qualified for promotion is not available.

A determination that the present bargainable interest of the BLF&E in apprentice engineer training programs, as representative of the craft of firemen, is limited to the effect of such programs upon the promotional rights of existing firemen also would not preclude the BLF&E from vying for the allegiance of apprentice engineers actually employed under existing or future apprentice programs. If the BLF&E should be chosen by the apprentices to be their representative, either in a Section 2 Ninth proceeding or in some other appropriate manner, the BLF&E would then be entitled to require

the carriers to bargain about the "rates of pay, rules, and working conditions" of the apprentices themselves and thus about the "internal structure of the apprentice programs."

This brings us to a brief comment about the reasoning of the principal opinion--reasoning which apparently is not necessarily endorsed by the two concurring members of the Court as they concurred only "in the result reached" and made the statements quoted above (among others) "to clarify the basis upon which" they relied (Slip Op., at 17).

The keystone of Part II of the principal opinion, as we understand it, is the following statement (Slip Op., at 8-9):

> "Here the facts are very different [from those in Virginian Railway]. The Mediation Board has not certified which union is the true representative of 'apprentice locomotive engineers.' As we discuss more fully below, it was quite correct in refusing to make such a certification. Thus, in bargaining with the Firemen over the terms of the apprentice engineer program, the carriers would not have derogated from the Engineers' status as certified representative of locomotive engineers, unless in some way such bargaining violated the carriers' collective agreement with the Engineers. But if this latter were the case, the Engineers' proper remedy lay not in the courts or before the Mediation Board, but rather in a proceeding under Section 3 of the Act before the National Railroad Adjustment Board. In short, no representative has been certified for 'apprentice engineers.' In such a situation, any union for whom future apprentices were 'fairly claimable' as part of that union's craft or class could legitimately bargain with the carriers about the terms and conditions under which such future engineers would work."

In short, until some union is certified by the NMB as the representative of the apprentices (which may never occur if the holding of this Court concerning the duty of the NMB under Section 2 Ninth stands), any union which can make a substantial argument that the apprentices should be included in its craft so that they are "fairly claimable" may require the carriers to "bargain about the terms and conditions under

which such future engineers would work." The principal opinion then goes on to demonstrate that the BLF&E (as well as the BLE) is in that position.

That reasoning, if adopted by a majority of the Court, would justify a mandate to the effect that the BLF&E's 1965 Section 6 notices are bargainable and that the NMB, therefore, could schedule those notices for mediation. But as we have noted, a majority of the Court apparently concurred for a different reason which does not, we believe, support such a mandate. If that is so, there is no need to demonstrate what we believe to be the errors in the reasoning of the principal opinion and for the most part our grounds for that belief should be readily apparent from the briefs and arguments. We do want to call attention, however, to an argument made in the Supplemental Brief we filed in connection with the further argument ordered by the Court. That argument seems to us to demonstrate that the principal opinion draws the wrong conclusion from the absence of a Section 2 Ninth certification, but this may not have been readily apparent as the argument was made in a somewhat different context--in response to the Court's question as to whether the NMB has discretion to decline to act under Section 2 Ninth, even if it has jurisdiction thereunder, until the nature of the apprentice programs has become more clearly established through collective bargaining. See Supplemental Brief for the Railroad Appellees, at pp. 8-13. Under the circumstances, we think it appropriate here to summarize that argument and note why, in our view, the absence of a Section 2 Ninth certification supports a conclusion that the carriers are not required to bargain with either union rather than the conclusion in the principal opinion that they may be required to bargain with both unions.

Section 2 Ninth was added to the Railway Labor Act by the 1934 amendments (48 Stat. 1185) to the original 1926 statute. The legislative history of the 1934 amendments discloses that Section 2 Ninth primarily was intended to remedy what was regarded as a defect in the original statute--its failure to impose upon the

carriers an enforceable duty to bargain with the union chosen by a majority of the members of a craft to be the collective bargaining representative of the craft. As a result, some carriers had ignored the union preferred by most employees and maintained "company unions." See H. Rept. No. 1944, 73d Cong., 2d Sess., at p. 2. Thus, Section 2 Ninth provided a certification procedure under the jurisdiction of the NMB and specified that: "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act."

That language and legislative history constituted the basis for the affirmance by the Supreme Court, in Virginian Railway, of an injunction requiring a carrier to bargain with a union that had been certified under Section 2 Ninth and restraining the carrier from bargaining with another union. The Court stated, among other things, that:

> "Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided. On the other hand, a prolific source of dispute had been the maintenance by the railroads of company unions and the denial by railway management of the authority of representatives chosen by their employees . . . . Section 2 Ninth, of the amended Act, was specifically aimed at this practice. It provided a means for ascertaining who are the authorized representatives of the employees through intervention and certification by the Mediation Board, and commanded the carrier to treat with the representative so certified. That the command was limited in its application to the case of intervention and certification by the Mediation Board indicates not that its words are precatory, but only that Congress hit at the evil 'where experience shows it to be most felt.'" (Emphasis added.)

Virginian Ry. v. Federation, 300 U.S. 515, 545-547 (1937).

In short, under the language and legislative history of the Act as amended as well as under the Virginian Railway decision, a carrier's mandatory duty to bargain with a union stems from the certification of that union by the NMB under Section 2 Ninth, and does not exist absent such a certification.[3/] The command to treat with a union "was limited in its application to the case of intervention and certification by the Mediation Board . . . ," as the Supreme Court observed. Consequently, if neither the BLF&E nor the BLE has been or can be certified (at least at this time) by the NMB under Section 2 Ninth as the representative of the apprentices, the result is not that the carrier is required to bargain with both unions about the internal structure of an apprentice training program--as the principal opinion herein reasons--but that the carrier is not required to bargain with either union about that matter. If that is so and the absence of a Section 2 Ninth certification is the decisive factor, as the principal opinion appears to hold, the judgment below insofar as it relates to the bargainability issue should be affirmed.

Since we understand, however, that the majority of the Court intended to limit its decision on the bargainability issue to the narrow ground stated in the concurring opinion and to leave open other questions going to the bargainability of the Section 6 notices served by the BLF&E, we believe the most appropriate course under the circumstances is to clarify the mandate so as to remand the case for further consideration of the bargainability issue by the District Court in the light of this Court's opinions.

II.

On January 13, 1969, Judge Sirica (acting upon a motion for supplemental

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3/ A holding that a union's proposal is non-bargainable ordinarily means only that the employer may not be required to bargain about that proposal; the employer may bargain and agree with the union if it voluntarily chooses to do so. See, e.g., Labor Board v. Borg-Warner Corp., 356 U.S. 342, 349 (1958). Moreover, a party may be precluded from challenging the bargaining authority of an uncertified representative where its authority has been recognized "in practice" by all concerned. Akron, Canton & Y. R. Co. v. International Bro. of Elec. Wkrs., 237 F. Supp. 343, 354 (N.D. Ill., 1964)

injunctive relief filed in the case below from which these appeals were taken) preliminarily enjoined the BLF&E from striking the Great Northern over its implementation of an apprentice engineer training program established by agreement with the BLE. In addition to filing an appeal from that injunction (No. 22,648), the BLF&E filed in this proceeding a motion for interim relief pending decision of these appeals. The principal opinion concludes with a statement (Slip Op., at 17) that: "The District Court orders enforcing its basic decree, from which the Firemen have sought interim relief, must be vacated along with the decree itself." We understand that statement to constitute a mandate to the District Court to vacate the prelininary injunction referred to above.

Neither the principal opinion nor the concurring opinion discusses the preliminary injunction or the reason why it should be vacated apart from the above-quoted sentence. It seems fairly apparent to us, however, that the reason is the reliance by the District Court upon its "basic decree" to support the issuance of the preliminary injunction, so that that order "enforcing its basic decree . . . must be vacated along with the decree itself."

Accepting the premise that under the Court's decision the "basic decree" must be vacated (although, for the reasons stated above, we believe that the case should be remanded for further consideration of the bargainability issue), we agree that the preliminary injunction was grounded primarily upon that basic decree and must also be vacated. Our only request in this regard is that the Court make unmistakeably clear that its mandate directing vacation of the preliminary injunction is without prejudice to the Great Northern's claim that it is entitled to injunctive relief against the threatened strike for reasons apart from enforcement of the "basic decree."

The Great Northern alleged in its motion for supplemental injunctive relief (paragraph 10) that the threatened strike would violate the Railway Labor Act and the Interstate Commerce Act, as well as the April 26, 1968 "basic decree" which has now been set aside by this Court. While the decision of this Court removes the prop provided by the basic decree, as we briefly indicate below that decision strengthens our grounds for believing that the threatened strike is otherwise illegal so as to be enjoinable. These issues have been neither fully briefed nor argued and are not discussed in the opinions of the Court. We are convinced, therefore, that the Court did not intend to rule that the threatened strike is valid and may not be enjoined on any ground. Assuming that that is so, we urge that the Court expressly so state as our prior experience in litigation with the BLF&E demonstrates its resourcefulness in seizing upon ambiguities and in rejecting what is implied rather than expressed. And, if the District Court should mistake the intention of this Court and deny further injunctive relief on the ground that this Court had completely foreclosed the matter, the devastating nature of even a short strike could well mean that an appeal would be an inadequate remedy and would certainly have that result if an injunction pending appeal was not quickly issued. On the other hand, if (contrary to our belief) the Court intended to hold that the threatened strike is valid and cannot be enjoined on other grounds as well as by reason of the basic decree, that would constitute a highly important ruling without the benefit of full briefing, oral argument or discussion in the Court's opinions, which surely should be reheard.

Both the principal and concurring opinions appear to us to have carefully avoided casting any doubt upon the validity of the apprentice agreements made by the L&N and the Great Northern with the BLE. Although the statements to which we

refer in that regard were directed to the L&N's apprentice agreement and program,[4/] which were in being before the suit was brought and the judgment below entered, the principal opinion correctly noted (Slip Op., at 5) that since "the bringing of this suit in the District Court, the Great Northern Railway Company has entered into a similar agreement with the Engineers and very recently has set in motion its own apprentice program."

Moreover, the reasoning in the principal opinion on the bargainability issue ( see pp. 6-9, supra) would seem clearly to sustain the right of the Great Northern to bargain and agree with the BLE about an apprentice training program. As that opinion notes "logic may point toward the Engineers' union representing all apprentice engineers" (Slip Op., at 9-10), and the joint proposal made in 1960 (id., at 10) lends as much support to the validity of an apprentice agreement with the BLE as it does to the validity of an apprentice notice served by the BLF&E. If all that is necessary in the absence of a certification under Section 2 Ninth is that the apprentices be "fairly claimable" as part of a union's craft to give that union a right to bargain about the terms and conditions under which such apprentices work, as

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4/ In footnote 17 (Slip Op., at 9-10), the principal opinion noted that a statement to the effect that the BLF&E, in the light of history, "had a reasonable expectation" that it might represent some apprentice engineers "is not to cast doubt on the Engineers' status as representatives of the apprentices actually employed by the L&N." On pages 14 and 15, the principal opinion, in concluding that there is no dispute cognizable under Section 2 Ninth even as to the apprentices employed by the L&N, stated that: "It will be recalled that the L&N apprenticeship program was instituted pursuant to an agreement with the Engineers, which left the content of the program to management discretion. These apprentices were to be represented by the Engineers. The carriers thought so, the union thought so, and apparently the apprentices thought so. No authorization cards were brought to the Board showing a dispute among the apprentices over who represented them. Nor was this a mere technical failing; no one has claimed before the Board, before the District Court, or before us, that any such dispute could have been shown." Both of the above statements are equally applicable to the situation as to the Great Northern's apprentices, except that as to these apprentices a Section 2 Ninth application has not even been filed. The last paragraph of the concurring opinion (Slip Op., at 19) seems to indicate an understanding on the part of the concurring members of the Court that the carriers may deal with the BLE in regard to an apprentice engineer program.

the principal opinion states, then there can be little doubt about the right of the BLE to bargain and agree with the Great Northern in that regard. More importantly (if we are correct in our understanding that the concurring majority does not endorse that theory), a limitation of the BLF&E's bargainable interest "to the effect and not the internal structure of the apprentice programs"--as the concurring opinion suggests may be done (see pp. 2-6, supra)--would leave no doubt about the right of the BLE to bargain and agree about "the internal structure of the apprentice programs." That is all that it has done on the Great Northern (and also on the L&N), and that carrier's apprentice program does not affect the right of qualified firemen to be promoted to locomotive engineers.

Hence, the opinions of this Court provide strong support for an argument that the Great Northern's apprentice engineer program and its agreement with the BLE in regard thereto are valid. And, surely one union (here the BLF&E) does not have a right to strike a carrier over valid agreements made by that carrier (the Great Northern) with another union (the BLE). A union's right to strike (i.e., to resort to "self help") generally is limited to situations where the procedures of the Railway Labor Act have been exhausted with respect to a valid or bargainable Section 6 notice.[5/] Insofar as we are aware, no one heretofore has suggested that one union may strike a carrier over the making or implementation of a valid agreement with another union. But such a strike would not differ in principle from a strike over a valid exercise by a carrier of its managerial prerogative--which strikes have been held to be illegal and enjoined. E.g., Chicago & North Western Ry. v. Order of Rail. Tel., 264 F.2d 254 (7th Cir., 1959), rev'd on other grounds, 362 U.S. 330 (1960); Brotherhood of Rail. Train. v. New York Central Co., 246 F.2d, 114 (6th Cir., 1957). See, also, Brotherhood of Railroad Trainmen v.

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5/ See, e.g., Railway Clerks v. Florida E.C.R. Co., 384 U.S. 238, 244 (1966); Locomotive Engineers v. B. & O. R. Co., 372 U.S. 284, 290-291 (1963); Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, 722-728 (1945). Since the BLF&E has not yet exhausted the procedures of the Act with respect to its apprentice notices, it could

Akron & B.B. R. Co., 128 U.S. App. D.C. 59, 385 F.2d 581, 599-604 (1967).

Since we understand that the Court did not intend to foreclose the Great Northern from seeking or the District Court from granting injunctive relief against the strike threatened by the BLF&E over that carrier's apprentice training program established by agreement with the BLE on grounds other than enforcement of the basic decree vacated by the Court, we urge the Court to clarify its mandate in that regard so as to leave no possible doubt about that intent. If the Court (contrary to our belief) did intend to foreclose the issuance of injunctive relief on other grounds, then we urge that the matter be reheard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition by Railroad Appellees for Clarification or Rehearing has been served on Appellants by mailing copies, this 27th day of March 1969, to: (1) Joseph L. Rauh, Jr., Rauh and Silard, 1001 Connecticut Avenue, N. W., Washington, D. C. 20036, and Isaac N. Groner, Cole and Groner, 1730 K Street, N. W., Washington, D. C. 20006, attorneys for the Brotherhood of Locomotive Firemen and Enginemen; and (2) Walter H. Fleischer, Department of Justice, Washington, D. C. 20530, attorney for the National Mediation Board. Copies also have been mailed to the attorneys for the Appellee Brotherhood of Locomotive Engineers.

Richard T. Conway

IN THE

# United States Court of Appeals

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,051

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*, PRESTO MANUFACTURING COMPANY, *Intervenor*.

No. 22,313

PRESTO MANUFACTURING COMPANY, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

**On Petition to Review an Order of The National Labor Relations Board**

## BRIEF FOR PETITIONER IN NO. 22,051



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## BRIEF FOR PETITIONER IN NO. 22,051

### STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue presented in Case No. 22,051 is whether the Board's Order is reasonable and proper.

(The pending case has not previously been before this Court under the same or any other title.)

### STATEMENT OF THE CASE

A. *Nature of the Case*

Case No. 22,051 is before the Court on the Petition of the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter, "IBEW") to review an order of the

National Labor Relations Board (hereinafter called "the Board"). Case No. 22,313 is before the Court on the Petition of Presto Manufacturing Company (hereinafter, "Presto") to review the same order of the Board. The Board has filed a cross-application for enforcement of the Board's order and a motion to consolidate both cases for all purposes, which motion was granted on October 29, 1968. This Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(f) (hereinafter, the "Act"). The Decision and Order of the Board is officially reported at 172 NLRB No. 30.

B. *Proceedings Below.*

1. *The Representation Case, Case No. 15-RC-3670.*

On May 19, 1967, the IBEW filed a petition for a Board election in a unit of production and maintenance employees, including the shipping and receiving departments, at Presto's Jackson, Mississippi plant. Pursuant to a notice issued by the Regional Director for the Board's Fifteenth Region on May 31, 1967, a representation hearing was held on June 13 of that year. On June 30, 1967, the Regional Director issued his Decision and Direction of Election, and an election was subsequently held on August 11, 1967, in which the IBEW received 334 votes, 245 voted against representation, and there were 29 challenged ballots.

On August 18, 1967, Presto filed objections to the conduct of the election, which objections were overruled in their entirety by the Regional Director in his Supplemental Decision and Certification of Representative (the IBEW), dated November 9, 1967.

On November 26, 1967, Presto filed with the Board in Washington a request for review of the Regional Director's Supplemental Decision and Certification of Representative. On January 2, 1968, the Board denied the request for review by telegraphic order. Presto's motion for reconsideration of the denial of its request, dated January 5, 1968, was denied by the Board's telegraphic order of January 23, 1968.

*2. The Unfair Labor Practice Proceeding, Case No. 15-CA-3211.*

Following the November 9, 1967 Certification of the IBEW as the exclusive bargaining representative of certain of Presto's employees, *supra,* the IBEW made several requests of Presto to bargain collectively over the terms and conditions of employment for the employees in the unit found appropriate, which requests were refused by Presto. On November 22, 1967, the charge giving rise to the proceeding below was filed by the IBEW, alleging that Presto had refused to bargain collectively, in violation of Section 8(a)(5) of the Act. A complaint and notice of hearing subsequently issued on January 29, 1968, which was amended on February 15, 1968.

Following Presto's answers to the original and amended complaints, the General Counsel moved for summary judgment on March 1, 1968. A show cause order on the General Counsel's motion for summary judgment was issued on March 5, 1968, and, following responses to same by the IBEW and Presto, Trial Examiner Marion C. Ladwig issued a decision on March 27, 1968 which granted the General Counsel's motion for summary judgment and found that Presto had, since November 16, 1967, refused to bargain collectively with the IBEW in violation of Section 8(a)(5) of the Act. After a Board remand of the proceeding, Trial Examiner Ladwig issued an amended decision on April 3, 1968. The Trial Examiner's recommended order included provisions requiring only that Presto cease and desist from refusing to bargain with the IBEW as the exclusive bargaining representative of its employees in the appropriate unit specified therein and in any like or related manner interferring with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act, and requiring it to bargain with the IBEW upon request to do so and to post designated notices at its plant in Jackson, Mississippi.

Both Presto and the IBEW filed exceptions to the Trial Examiner's amended decision, those filed by the IBEW being limited to the nature of the remedial relief granted

by the Trial Examiner. Specifically, the IBEW requested the Board to order Presto to take certain remedial action in addition to that recommended by the Trial Examiner, as follows:

> (1) Mail to each employee a copy of the notice attached as an appendix to the Trial Examiner's decision.
>
> (2) For a period of six months, grant the Charging Party and its representatives reasonable access to bulletin board and other places within Respondent's plant where notices to employees are customarily posted.
>
> (3) Upon the Charging Party's request, make available within one month, at a mutually agreeable time, suitable facilities for a one hour meeting with employees on company time.
>
> (4) Permit employees to have access to representatives of the Charging Party on the plant parking lot, during non-working time, prior to and during collective bargaining negotiations for a contract.
>
> (5) Make its employees whole for wages and fringe benefits which they have lost as a result of Respondent's unlawful refusal to bargain with the Charging Party since its certification.

On June 24, 1968, the Board issued its Decision and Order adopting the findings, conclusions and recommended order of the Trial Examiner. In footnote 1 thereof, the IBEW's request for remedial provisions in addition to those recommended by the Trial Examiner was denied:

> "In its exceptions the Charging Party requests that certain further remedial provisions be added to those recommended by the Trial Examiner. As we do not find that such additional provisions are required or appropriate at this time to remedy the unfair labor practices found in this proceeding, the Charging Party's request is hereby denied."

In the proceeding before this Court, Petitioner IBEW seeks review of that portion of the Board's Decision and Order denying the additional remedial relief it requested before the Board.

C. *Background.*

The above chronology outlines the principal events in both the unfair labor practice case here under review and the underlying representation proceeding which began with the filing of the IBEW's petition on May 19, 1967. But the events actually giving rise to the present proceeding go back to March 18, 1966, when the IBEW filed an election petition in Case No. 15-RC-3344. An election was conducted in that case on May 26, 1966 in which 330 votes were cast for the IBEW, 7 for an intervening union and 340 against either union. Timely objections were filed by the IBEW, and unfair labor practice charges were subsequently filed against Presto on August 22 and 23 and October 18, 1966 in Cases Nos. 15-CA-2902, 2902-2 and 2902-3. The Board's Regional Director issued a complaint on the charges on December 16, 1966 and thereafter consolidated both cases with certain objections to the conduct of the Board's election of May 26, 1966 in Case No. 15-RC-3344.

A hearing on the consolidated cases was held before Trial Examiner Lloyd Buchanan on March 29-31, 1967. On April 4, 1967, the IBEW filed with the Regional Director a request to withdraw its objections to the election in Case No. 15-RC-3344, on the grounds that a second election for the employees could be held sooner through the filing of a new petition than through the continued processing of its objections in the pending representation case. On April 5, 1967, the Regional Director filed a motion seeking to have the representation case severed from the complaint cases and remanded to the Region for action on the IBEW's request to withdraw its objections. The motion was denied by the Trial Examiner, and there followed a series of procedural moves by all parties, resulting in an order by the Board, on May 18, 1967, reversing the Trial Examiner and remanding the representation case to the Regional Director for appropriate action. On May 19, 1967, the Regional Director approved the IBEW's request to withdraw its objections, and issued a Certification of Results of Election in Case No. 15-RC-3344. On that same date, the IBEW filed its petition in Case No. 15-RC-3670.

On May 31, 1967, Trial Examiner Buchanan issued his decision in the consolidated cases referred to above. Although he dismissed most of the allegations of the complaint issued by the Regional Director, he found that Presto had violated Section 8(a)(1) of the Act through foreman Smith's threats to a group of employees and his unlawful interrogation of one of them. In its subsequent Decision and Order of January 2, 1968, 168 NLRB No. 144, the Board adopted the findings, conclusions and recommendations of the Trial Examiner, but found an additional violation of Section 8(a)(1) of the Act in supervisor Washington's interrogation of employee Chambers.

As the Employer's entire course of conduct since the filing of the initial petition on March 18, 1966, including its unlawful activity found by the Board, is relevant to the issues raised by the IBEW's petition for review in Case No. 22,051, the Court is respectfully requested to take judicial notice of the Board's Decision and Order reported at 168 NLRB No. 144, 67 LRRM 1173.

## SUMMARY OF ARGUMENT

In order fully to effectuate the policies of the Act, a remedy must have as its purpose the "restoration of the status quo to the greatest extent practicable" which must be measured by its ability "to redress the injury done to employees." *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB*, 126 U.S. App. D.C. 81, 86, 374 F. 2d 295, 300 (D.C. Cir. 1967). Because of Presto's unlawful refusal to bargain, the right of its employees to bargain collectively and to gain the fruits of such bargaining will be delayed for a period of at least some 1½-2 years. The effects of this delay are twofold: the weakening of their bargaining strength and of the position of their bargaining representative, and a direct loss of financial benefits which could have been achieved through collective bargaining.

The Board's standard "cease and desist" and "bargain upon request" order will not be adequate to dissipate these

effects and redress the injury to the employees. The means of access requested of the Board are necessary to have a sufficient impact on employees in order to restore the situation that would have existed in November 1967 but for Presto's unlawful refusal to bargain. The Board, in some instances, has granted such relief. *H. W. Elson Bottling Company,* 155 NLRB 714, enforced as modified 379 F. 2d 223 (6th Cir. 1967); *Scotts, Inc.,* 159 NLRB 1795, enforced as modified *sub nom. IUE* v. *NLRB,* 127 U.S. App. D.C. 303, 383 F. 2d 230 (D.C. Cir. 1967).

Finally, a financial reimbursement remedy is both appropriate and necessary, *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177 (1951); *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). It should be imposed herein in order to make the employees whole for the loss occasioned by Presto's refusal to bargain and to deny to Presto the opportunity to profit from its unlawful action. The propriety of such an order is an issue specifically left open by this Court in *UAW* v. *NLRB,* ..... U.S. App. D.C. ....., 392 F. 2d 801, 810 (1967).

## ARGUMENT

### THE ADDITIONAL RELIEF REQUESTED IS NECESSARY IN ORDER FULLY TO EFFECTUATE THE POLICIES OF THE ACT

In pertinent part, Section 10(c) of the Act states that:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .*" (Emphasis supplied.)

In order to "effectuate the policies of this Act," a Board order must, in the words of this Court, cause the "restoration of the status quo to the greatest extent practicable;

however the basic purpose of restoring the status quo is to redress the injury done to employees [citations omitted]." *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB,* 126 U.S. App. D.C. 81, 86, 374 F. 2d 295, 300 (D.C. Cir. 1967), cert. den. 387 U.S. 942 (1967). It is respectfully submitted that, in terms of the effect on Presto's employees, it is impossible to restore the *status quo ante* without the additional relief requested by the IBEW.

It will be observed from the list of remedial relief sought by the IBEW before the Board, p. 4 *supra,* that these items fall into two broad categories. Items 1-4 request a grant of additional access to employees through various means, and item 5 seeks reimbursement of the employees for wages and fringe benefits lost because of Presto's unlawful refusal to bargain since the certification of the IBEW on November 9, 1967. The need for the additional remedial relief can best be seen by re-examining the sequence of events in the related proceedings involving the IBEW and Presto and by noting the length of time during which Presto's employees have been deprived of their statutory right to bargain collectively through a representative of their own choosing.

At the writing of this brief, just over one year has elapsed since the certification of the IBEW. By the time all briefs are filed and argument heard, a decision cannot reasonably be expected for at least another 4-5 months, or almost a year and a half following certification, and a year and three quarters since the Board election in which the employees made their choice of a bargaining representative. It may be recalled in this regard that the election in Case No. 15-RC-3344 was actually conducted on May 26, 1966, almost two and a half years ago, and that the IBEW's objections in that case were withdrawn and a new petition filed so that a final decision concerning the employees' choice of a bargaining representative could be *expedited.*

When, pursuant to Court order, Presto finally comes to the bargaining table, the adverse effects of this protracted

delay upon the employees will be twofold: first, as noted above, they will have lost the financial benefits which would have accrued to them earlier if Presto had bargained in good faith immediately following certification of the IBEW in November of 1967; and, second, the strength and ability of their designated bargaining representative to bargain effectively will have been severely weakened, along with the faith of the employees in the bargaining processes guaranteed by the Act. These effects are not abstract or imaginary. Rather, they are based on observations drawn after an extensive study of Board practice in refusal-to-bargain cases. Professor Philip Ross of the University of Pittsburgh's Graduate School of Business conducted a study of such cases over a five-year period. The text of Chapter 1 of his study, "Analysis of Administrative Process under Taft-Hartley," was published by the Bureau of National Affairs in its Labor Relations Reporter of October 17, 1966, 63 Lab. Rel. Rep. 132. One of Professor Ross' major findings was that:

> "5. The collective bargaining consequences of a remedied violation depended mainly upon the nature and extent of an employer's original resistance to bargaining and his persistence in delaying compliance. *Litigated cases frequently differed from non-litigated cases in fundamental ways and employers who litigated charges often succeeded in ousting their unions.*" 63 Lab. Rel. Rep. at 133. (Emphasis supplied.)

Later in his study, Professor Ross elaborated on this finding as follows:

> "By far, the most significant influence on bargaining consequences was the stage of case disposition. The facts speak for themselves. About two-thirds of cases closed before issuance of complaints resulted in execution of first contracts. This is substantially higher than the results in all the other stages. Even the informal cases which were closed after issuance of complaint did not quite reach this level of contracts achieved.
>
> "With the exception of the handful of cases which required Supreme Court action prior to closing, *the longer the litigation the less likely was the prospect of*

*the signing of a first contract.* Only about half of all cases closed after a Board order resulted in such contracts and *less than 36% of the cases closed after circuit court enforcement ended up with agreements.*

"The explanation for these results which comes most readily to mind is the factor of time. The long, drawn out process of administrative investigation, hearing and findings and, ultimately adjudication, bring two, three and four years of delay and a weakening of the charging union through the effects of the unexpunged unfair labor practices upon the employees. Even events unrelated to the unfair labor practices, such as changes in the number and composition of employees, work to the same end.

"That justice delayed may end up in justice denied appears to be confirmed by this relationship of stage of cases closing with bargaining consequences. But this is not all of it. *A major finding of this study is that there are fundamental differences between employers who informally adjust their violations of the duty to bargain and those employers who exhaust every legal recourse prior to compliance.*

"These differences concern the nature and extent of the unlawful activities engaged in by the employer. On an average, a litigated case involved more separate violations of the duty to bargain and these were accompanied by far more extensive other unfair labor practices than were adjusted cases. *For example, only about 35% of the employers who informally settled their 8(a)(5) violations committed other unfair labor practices. Where court enforcement was necessary, about 69% of the employers had engaged in other violations.*" 63 Lab. Rel. Rep. at 136. (Emphasis supplied.)

It is in the context of the experience related by Professor Ross that the effects of Presto's lengthy course of resistance to collective bargaining on its employees, as well as the adequacy of the Board's standard remedial order, must be judged. And, viewed in that context, it is respectfully submitted that, if the policies of the Act are ultimately to be effectuated through meaningful bargaining with Presto, something more than the Board's "boilerplate" remedies is necessary. As Dean Bok has noted,

> "Aside from encouraging needless litigation, inadequate remedies also work an injustice on the parties involved. Employees may be compelled to forgo collective bargaining for months, and even years, while litigation drags on over violations that should never have occurred."[1]

Congress, of course, enacted Section 8(a)(5) for a specific purpose, and one that is fundamental to the policies of the Act. Remedies for violations of that Section must be effective, for "we refuse to believe that Congress was bent on the elaborate futility of a *brutem fulmen.*"[2] Moreover, since "remedies are the life of rights,"[3] they must meet the needs of given cases in order to be effective.

The standard Board remedies in most 8(a)(5) cases amount to nothing more, however, than a slap of the Employer's wrist. As the Sixth Circuit has stated,

> "A mere cease and desist order . . . may serve only to represent formal acknowledgment of the law while the offender maintains full possession of the fruits of its violation."[4]

The remedies requested by the IBEW and denied by the Board are essential if, in fact, Presto's refusal to bargain is to be *effectively* remedied. Thus, with respect to the requests for additional access to employees, it is not unnatural that, after the passage of almost two years following their choice of a bargaining representative, with nothing to show for it other than continuing reminders of the futility of choosing a union, the employees will question whether their representative can actually deliver for them through the process of collective bargaining. It is necessary, therefore, to grant additional means of access to the employees in order to dissipate these effects. In view of Professor

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[1] Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harvard Law Review 38, 124 (1964).

[2] *People of Puerto Rico* v. *Hermanas, Inc.*, 309 U.S. 543, 548.

[3] *Campbell* v. *Holt*, 115 U.S. 620, 631.

[4] *Montgomery Ward & Company* v. *NLRB*, 330 F. 2d 889, 894 (1965).

Ross' study, it seems doubtful that the customary posting of notices at the plant can assure a complete return to the situation which would have existed in 1967 had Presto not then refused to bargain in good faith. Through the means suggested, and particularly through presentations by union spokesmen on Company premises, a far more substantial impact can be made on employees for the purpose of restoring their belief in the statutory process of collective bargaining and thereby strengthening the position of their chosen representative. (See further in this regard page 13 *infra.*)

In certain circumstances, the Board itself has recognized the need for remedial relief beyond its standard "cease and desist" and "bargain upon request" orders. Thus, in *H. W. Elson Bottling Company,* 155 NLRB 714, the Board agreed with the charging party there that more than the usual posting of notices was required:

> "The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred and thereby effectuate the policies of the Art. Thus, 'depend[ing] upon the circumstances of each case,' the Board must 'take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'" (Footnotes omitted.) [5]

The additional relief granted by the Board included the requirement that the company there mail a copy of the Board's notice to each of its employees, grant to the union reasonable access to its bulletin boards and other places where notices to employees were customarily posted, for a three-month period, and permit the union to address the employees while assembled on company time and premises.

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[5] 155 NLRB at 715. The Board also noted in this regard, that "This process requires constant reevaluation of the Board's remedial arsenal so that the 'enlightenment gained from experience' can be applied to the 'actualities of industrial relations,' citing *NLRB* v. *Seven Up Bottling Company of Miami, Inc.*, 344 U.S. 344, 346; *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236."

In support of the last requirement, the Board noted as follows:

> "The unique effectiveness of speeches addressed to employees assembled during working hours at the locus of their employment has received congressional and judicial recognition and has been substantiated by research studies. Staff of Subcomm. on National Labor Relations Board, House Comm. on Education and Labor, 87th Cong., 1st sess., Administration of the Labor-Management Relations Act by the NLRB 58 (Comm. Print 1961); *N.L.R.B.* v. *United Aircraft Corp. and Whitney Aircraft Div.*, 324 F. 2d 128, 130 (C.A. 2), cert. denied 376 U.S. 951; Note, 61 Yale L. J. 1066, 1074-1076, footnotes 33-39 (1952); Note, 14 U. Chi. L. Rev. 104, 108-110 (1946)."

On the Board's petition for enforcement, the Sixth Circuit approved the first two remedial provisions and modified the third to apply only in the event that the company subsequently addressed its employees with respect to union representation during the six-month period following entry of the court's order. *NLRB* v. *Elson Bottling Company*, 379 F. 2d 223 (1967).

In *Scott's Inc.*, 159 NLRB 1795, another of the so-called "serious misconduct" cases, the Board imposed the three elements of the *Elson* remedial formula and added the requirement that the employer read the Board's notice to employees during working time. 159 NLRB at 1807-1808. On review, this Court unanimously approved the *Elson* ingredients but, by a two-to-one vote, rejected the additional requirement of the reading of the notice by the employer. *IUE* v. *NLRB*, 127 U.S. App. D.C. 303, 383 F. 2d 230 (1967).[6]

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[6] For other instances of Board orders granting similar additional relief, see the following: *Marlene Industries Corp.*, 166 NLRB No. 58; *Sterling Aluminum Company*, 163 NLRB No. 40; The *J. P. Stevens* family of cases, 157 NLRB 869, enforced as modified 380 F. 2d 292 (2d Cir. 1967), 163 NLRB No. 24, enforced as modified 388 F. 2d 896 (2d Cir. 1967); 167 NLRB Nos. 37 and 38; 171 NLRB No. 163.

The Board may argue that the additional remedies requested are not appropriate here, as this is merely a "technical" 8(a)(5) case and that the *Elson* type remedies should be reserved for the "flagrant" or "serious misconduct" cases in which there is excessive evidence of union animus. There is no merit to that contention. First, as noted above, in any discussion of remedial relief as a means of restoring the *status quo ante,* the principal objective is the removal of the effects of the employer's unfair labor practices on his employees, regardless of the motivation therefor. It is the employees of Presto who have been injured because of the refusal of Presto to bargain for a period of 1-2 years. Only if the Board were empowered to punish employers would the latter's motivation have relevance to the type of relief afforded. Since this is not the case, however, we must look to the actual effect on the employees. And, so viewed, the relief sought is both necessary and proper. This very point has received the attention of this Court in the *Garment Workers* case, *supra* at pp. 7-8. Subsequent to setting forth the general principles governing remedial relief, quoted above, the Court compared the several cases in which the Courts of Appeals had dealt with remedies in "runaway plant" situations. In pertinent part, it observed that,

> "If the Board is suggesting that this remedy is suitable because the company has been hostile, it is making out a case that the order is not remedial but punitive. This is not a valid basis for an order. The Board's attempted distinction also overlooks the fact that employer anamosity toward the union was present in *Rapid Bindery,* although the Court concluded that the record did not support the Board's finding that this was the preponderant motive for the move. Finally, there was no hostility to the union in *Lewis, supra,* where the Ninth Circuit affirmed the remedy. Employer motivation or attitudes toward the union hardly seems to be the touchstone of judicial response." 126 U.S. App. D.C. at 89, 374 F. 2d at 303.

In any event, considering the entire background and course of events in this case, this cannot be considered as

merely a "technical" violation. It has been shown above that, in the course of the IBEW's first election campaign in 1966, Presto was found to have committed several independent violations of Section 8(a)(1) in the Board decision reported at 168 NLRB No. 144 67 LRRM 1173. Moreover, since at least some of these occurred prior to the holding of the election, the violations found by the Board probably would have resulted in the setting aside of that election had not the IBEW withdrawn its objections thereto for the reasons stated above. Thus, while we do not contend that this case stands on a par with *J. P. Stevens, Elson* or the other "massive violation" cases, the record in these related proceedings reveals that Presto is somethng other than the upright employer forced reluctantly and in complete good faith to resort to litigation in order to test the validity of a Board certification. Therefore, judged on either basis, this case is an appropriate one for the granting of the additional relief requested.

As for the financial remedy requested in item no. 5, it is elementary, of course, that,

> "Making the workers whole for the losses they have suffered on account of an unfair labor practice is part of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941).

It cannot be gainsaid that, but for Presto's refusal to bargain, negotiations would have been entered into long ago, or that the employees would for a longer period of time have enjoyed the benefits of increased wages and other working conditions bargained for them through their collective bargaining representative. They are, therefore, entitled to be made whole for the loss caused by Presto's unlawful acts. As for the Board's authority to grant a financial disbursement remedy in a refusal-to-bargain case, that matter has been put to rest by the Supreme Court in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).

The issue here presented was left open by this Court in *UAW* v. *NLRB*, ..... U.S. App. D.C. ....., 392 F. 2d 801, 810 (1967), cert. den. ..... U.S. ....., 20 L. Ed. 2d 1364

(June 10, 1968). This Court found it unnecessary to pass on the Board's denial of the union's request for compensatory relief during the period in which the company unlawfully refused to bargain, or its refusal to explicate its grounds for the denial, since the Board itself petitioned the Court to remand that portion of its order for re-evaluation. That was one year ago. Some four months prior to that decision, the Board heard oral argument is a series of cases on the overall question of the appropriateness of compensatory relief in refusal-to-bargain cases. Yet, there is still no decision from the Board and no appearance of one to come. Unless the Board similarly petitions the Court in this case, the issue will now be squarely before the Court. And, even if the Board again requests a remand, the question that arises is whether the Board should be permitted to delay indefinitely its consideration and ruling on this important question. However difficult this issue may be, this Court has itself remarked that:

> "In the evolution of the law of remedies some things are bound to happen for the 'first time' . . . . We cannot regard changes in remedial mechanisms as beyond the Board's powers so long as they reasonably effectuate the congressional policies underlying the statutory scheme."[7]

Since the right of employees to select their representatives for the purposes of collective bargaining lies at the very heart of our national labor policy, it is essential to deter conduct which subverts that policy. In fashioning remedies to deter such conduct, therefore, it is necessary to consider, *inter alia*, the benefits which wrongdoers hope to gain—and often do gain—through their misconduct. The benefit sought by employers in refusing to bargain with unions is the time gained by such delay—perhaps as much as two years in this case—with the frequent result of retaining the freedom from collective bargaining which they have opposed from the beginning.[8] Therefore, in addition

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[7] *International Brotherhood of Operative Potters* v. *NLRB*, 116 U.S. App. D.C. 35, 39, 320 F. 2d 757, 761 (1963).

[8] See the Ross study, *supra* at pp. 9-10.

to the need to make employees whole as a means of restoring the *status quo ante,* compensatory relief is essential in order to take the profit out of violations of Section 8(a)(5). The alternative is, for all practical purposes, the granting of an economic incentive to those who break the law. For these reasons, it is respectfully submitted that the Court should at this time pass on the continuing failure of the Board to grant financial reimbursement in 8(a)(5) cases and hold that the grant of such relief is appropriate in the instant case.[9] At the very least, the Court should require the Board to provide a *real* explanation for its failure to do so.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the additional relief requested below, but denied by the Board, is both appropriate and necessary in order fully to remedy Presto's unlawful refusal to bargain and to restore the status quo prior to said violation of the Act. The Court should, therefore, modify the Board's order accordingly or remand to the Board for reconsideration only that portion of its Decision and Order denying the additional relief requested. In all other respects, the Board's order should be fully enforced at this time.

Respectfully submitted,

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November 1968

[9] The specific *quantum* of damages would, of course, be determined during the compliance stage of the proceedings below.

## APPENDIX

### Statutes Involved

National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, 61 Stat. 136:

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Section 10(c). The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . .

IN THE

# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 22,051**

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INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, Respondent
PRESTO MANUFACTURING COMPANY, Intervenor

---

**No. 22,313**

---

PRESTO MANUFACTURING COMPANY, Petitioner

versus

NATIONAL LABOR RELATIONS BOARD, Respondent

---

**BRIEF FOR PETITIONER IN CASE NO. 22,313
AND INTERVENOR IN CASE NO. 22,051**

---

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INTERNATIONAL BROTHERHOOD OF
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No. 22,313

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PRESTO MANUFACTURING COMPANY, *Petitioner,*

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*Respondent.*

---

# BRIEF FOR PETITIONER IN CASE No. 22,313 AND INTERVENOR IN CASE No. 22,051

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## STATEMENT OF ISSUE PRESENTED FOR REVIEW

The issue presented in Case No. 22,313 is whether the Board properly certified the Union as the exclusive representative of the employees in an appropriate unit.

The issue presented in Case No. 22,051 is whether the Board Order is reasonable and proper.

(The pending cases have not previously been before this Court under the same or any other title.)

## STATEMENT OF THE CASE

### *A. Nature of the Case*

Case No. 22,051 is before the Court on the petition of the International Brotherhood of Electrical Workers, AFL-CIO (herein called "IBEW") to review an Order of the National Labor Relations Board issued June 24, 1968. Case No. 22,313 is before the Court on the petition of Presto Manufacturing Company (herein called "Presto") to review and set aside the same Order of the Board. The Board has filed a cross application for enforcement of its Order and its motion to consolidate both cases for all purposes was granted on October 29, 1968. The Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.) The Board's Decision and Order are reported at 172 NLRB No. 30.

*B. The Proceedings Below*

*1. The Representation Case, Case No. 15-RC-3670*

On May 19, 1967 IBEW petitioned for an election among the production and maintenance employees of Presto in its Jackson, Mississippi plant. Pursuant to a Decision and Direction of Election of the Regional Director on June 30, 1967, an election was held on August 11, 1967 in which IBEW received 334 votes and 245 votes were cast against union representation, and there were 29 challenged ballots.

On August 18, 1967, Presto filed Objections to the Conduct of the Election. These Objections were overruled in their entirety by the Regional Director in his Supplemental Decision and Certification of Representative which issued on November 9, 1967. The Supplemental Decision was based upon an informal investigation conducted by a representative of the Board's regional office. There was no hearing on the Objections. Presto filed objections with a variety of grounds for setting the election aside.[1] The challenge to the

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[1]In addition to the misrepresentations here asserted as grounds for denying enforcement of the Board's Order, Presto alleged that IBEW had misrepresented the wage and union situations at two other plants in Jackson, Mississippi, that IBEW had sought to inflame racial feelings in the plant, that the Board had improperly permitted the processing of IBEW's election petition in this case without affording Presto an opportunity to vindicate itself of IBEW's objections in the previous election, and that IBEW improperly capitalized on its expulsion from membership of a company supervisor immediately prior to the election. In view of the appropriate standard of judicial review, which restricts the Court to review of the substantiality of evidence, these issues are not discussed herein.

validity of the representation election before the Court involves certain Union misrepresentations which were included in handbills distributed to the employees on July 20, 1967, August 10, 1967, and August 11, 1967.

The handbill of July 20, 1967 (page 5 of the Regional Director's Decision) was issued subsequently to an election handbill wherein Presto had announced to the employees that an election date had been set: "While you were away we arranged with the Government to hold an election August 11 to decide whether you want or do not want the union." (Regional Director's Decision, pages 7 and 20) In its handbill of July 20, IBEW referred to the statement and commented as follows: "We have told you people Time after Time that *The Company was dealing with the NLRB behind your backs and there was nothing the IBEW could do about it.* So, Mr. Hall finally Told the Truth. He confirmed in writing what the IBEW has been telling you all along." (App. 82)

By letter dated July 28, 1967, Presto, through its attorney, wrote the Regional Director of the Board and requested him to require the IBEW to retract its charge that the NLRB and Presto were dealing behind the backs of the employees. The letter requested that the Regional Director send Presto a letter stating that he had had no dealings behind the backs of the employees. The letter indicated that the reply of the Regional Director would be shown to the voters so that their ballots would be cast independent of any misapprehension concerning the integrity of the National Labor Relations Board. (App. 83-85) No copy of

the letter to the Regional Director was served upon the IBEW. On August 4, 1967, the Regional Director served a copy of this letter upon all parties to the proceedings, including separate service upon IBEW, its attorney, and its international representative. (App. 86) This letter characterized the letter from Presto's counsel as an ex parte communication prohibited by Sections 102.126, 102.128(a) and 102.129(a) of the Board's Rules and Regulations (the text of these sections are reproduced in the Appendix to this Brief). Such service provided for a response subsequent to the holding of the election itself under the provisions of Section 102.133 (a).

On August 10, 1967, the day preceding the election, the Union distributed a handbill to the employees which included the following:

> "After 13 long years of business and This Company does not have a pension plan for it's (sic) employees, and They are telling you that you have not been mistreated? Now I know that some of you people are still young enough that you are not thinking too much about retiring but *NOW is The Time you should secure your Pension Plan, so you won't have to worry about it in the future.*
>
> * * * *
>
> "Yes, You have an Insurance Plan, but *What Good Is It??* Have you ever had to use it? For those of you who have used it, You Know

How Lousy It Is. But for those of you who have not used it, Let me give you some examples!

* * * *

"A most recent case, Ask Thomas Barnett about his Policy. His wife just had a Baby and The Presto Insurance policy paid a lousy $80.00 on the hotel bill, and a lousy $90.00 on the doctor bill. He still owes 300 and some odd dollars. Where is he going to get it? He sure doesn't make enough at Presto to make ends meet.

* * * *

"I understand that the company is supposed to pay the same amount that you pay. That would make $1.70 from you, $1.70 from the company, which means the insurance company should be receiving $3.40 per week and for $3.40 a week you should be able to get a real good policy.

"I wonder if the company is paying their share? It might be worth looking into."

On the day of the election, the Union issued a leaflet which concerned itself with the company's personnel consultant and the fees which had been paid to him by Presto and its affiliated companies. The Union referred to it as follows:

> "He is what we call the Union Buster, and he has been running around the plant all this week.
>
> "WHAT'S THE FEE OF THE O.L.C.??
>
> "Well, take a look at the money that Presto is paying this man to keep the Union out of this plant. These figures came from the U. S. Labor Department in Washington, D. C."

The leaflet then contained a reproduction of the amount of money paid to the consultant as shown on a report filed with the Department of Labor. It totaled $14,901.63 in fees and out of pocket expenses for the year 1966, the IBEW's handbill went further:

> "No wonder Mr. Hall only gave you a Lousy 8¢ increase this year. Why didn't they give you this money in wage increases instead of giving it to the Union Buster. Note, that the above fee's (sic) and expenses was for 1966, and they only show what he turned in. Did you notice that all of the payments were CASH.
>
> "I wonder how much they have paid HIM THIS YEAR?"

Presto also objected to the Board's requirement that it submit a list of the names and addresses of the employees in the voting unit to be turned over to IBEW to assist it in the election campaign. This list, required under the Board's rule enunciated in *Excelsior Under-*

*wear, Inc.*, 156 NLRB 1236, was submitted under protest with the company reserving its right to file objections based upon the requirement of the list.

The Board declined to review the finding of its Regional Director that there were no substantial and material issues affecting the election. Presto filed a Motion for Reconsideration, specifically requesting an interpretation of those sections of the Board's Rules and Regulations which had been construed by the Regional Director. This Motion was denied by the Board.

2. *The Unfair Labor Practice Case, Case No. 15-CA-3211*

Upon a charge filed by the IBEW, the Board issued a Complaint and an Amended Complaint, alleging that Presto violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union. Presto has refused to bargain as a means of securing court review of the Board's overruling of the Objections to the Election.

Upon the filing of a Motion for Summary Judgment by the General Counsel, Presto filed an opposition and requested a hearing. The Motion was granted by the Trial Examiner who found that Presto had refused to bargain with the certified representative of its employees. Neither General Counsel nor IBEW sought an extraordinary remedy before the Trial Examiner. Consequently, his recommended order simply required that Presto bargain, upon request, with IBEW, with no discussion of the remedies now sought by IBEW.

Both Presto and IBEW filed exceptions to the Trial Examiner's Amended Decision. For the first time, IBEW requested access to the employees on company premises, backpay, and the other remedies now sought from this Court. The Board sustained the Trial Examiner's Amended Decision and ordered the conventional refusal to bargain remedy.

## SUMMARY OF ARGUMENT

*A. The Validity of the Election*

The Board has considerable discretion in establishing the standards for evaluating the fairness with which its elections are conducted. Judicial review is concerned with whether substantial evidence supports its findings and conclusions within the framework of that policy.

Although the Board's standards for measuring the effect of misrepresentations on employee choice in an election are proper, they were improperly applied in this case. It failed to follow its own precedent in deciding the time within which the other party to the election may reply to the misrepresentation. It incorrectly characterized certain misrepresentations as purely campaign propaganda.

Presto has established that IBEW misrepresented that the company was guilty of improper relations with the Board under circumstances preventing Presto from dispelling its effect upon employees. IBEW misrepresented the insurance benefits being received by

employees, repeated misrepresentations concerning their pension plan, and misrepresented that Presto was paying money rightfully theirs to prevent unionization. It has established a prima facie case of unfairness in conduct affecting the results of the election, and there is not substantial evidence in support of its contrary conclusion. Therefore the Board order directing Presto to bargain, upon request, should be denied enforcement.

*B. The Board's Order*

If the Court finds that the Board's order should be enforced, it should find that it is reasonable and proper to remedy the unfair labor practices found. The Act does not provide for direct review of Board decisions in employee representation proceedings. The only method by which an employer may secure court review of such agency action is by refusing to bargain and thereby to test the Board's election process through an unfair labor practice proceeding. This is what Employer has done in this case and has been charged with no other unfair labor practice in this proceeding.

The granting of an extraordinary remedy in this type of proceeding would have the effect of punishing the Company for pursuing the statutory method of reviewing Board election proceedings and could effectively prevent the exercise of a statutory right.

The provisions of Section 8 (d) of the Act provides that the obligation to bargain shall not include the compulsion to agree to a proposal or require a con-

cession. The effect of an order in this proceeding requiring the payment of backpay to employees would both require a concession and determine the amount of such concession in the proceeding which itself determined the existence of the duty to bargain.

The rights of employees and the Union are protected by the Board's order. The purpose of the remedy is to restore the status quo. An order to bargain satisfies this purpose and accords with the policies of the Act.

## ARGUMENT

### *A. The Validity of the Election*

Congress has entrusted to the Board "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 91 L. ed. 322 (1946). This has been construed by the Seventh Circuit as follows:

> "The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules,

and regulations promulgated by the Board. *Celanese Corp.* v. *NLRB,* 291 F2d 224, 225, (7th Cir., 1961), cert. den., 368 U.S. 925, 82 S. Ct. 360, 7 L. ed. 2d 189 (1961).

While recognizing the degree of discretion reserved to the Board, this Court has not restricted its review of Board decisions in election situations to whether or not the Board acted arbitrarily or capriciously. *N.L.R.B.* v. *National Truck Rental Co.,* 99 U.S. App. D.C. 259, 239 F2d 422, 425-426 (1956).

The Board utilizes three criteria in evaluating misrepresentations during election campaigns: (1) whether or not the misrepresentation was of a material fact; (2) whether the misrepresentation came from a party with special knowledge of the true fact; and (3) whether the opposing party had sufficient opportunity to correct the misrepresentation. These criteria have generally been approved by the courts. This Court has found their use "unobjectionable and within the competence of the Board." *Steelworkers* v. *N.L.R.B.,* U.S. App. D.C. 393 F2d 661, 664, (1968).

The Court in *N.L.R.B.* v. *Houston Chronicle Publishing Co.,* 300 F2d 273, 278 (5th Cir. 1962), referred to these criteria and characterized them as "merely useful factual tests for ascertaining whether the legal standards have been transgressed; that is, whether the effect of circumstances surrounding an election was such that the results of the election reflects the desires of the employees, free of improper influences."

The Board improperly applied these criteria in its conclusion that the alleged misrepresentations by IBEW did not raise substantial and material issues, affecting the outcome of the election which required a hearing to determine the impact of the conduct on the election.

*1. The Misrepresentation That the Board and the Company Were Dealing Behind the Backs of the Employees*

Employer has a period each summer during which the entire plant is closed down and employees are on vacation. During this time in 1967, the Regional Director's Decision and Direction of Election was issued. Routinely, the Board's agent called representatives of the Union and of the Company on the telephone and arranged for an election including the date and the usual details incident thereto. When the employees returned to work, Employer notified them of the fact that an election had been set in a bulletin which stated: "While you were away, we arranged with the Government to hold an election August 11th to decide whether you want or do not want the Union."

On July 20, 1967, IBEW handbilled all of the unit employees with a bulletin which contained the following: "We have told you people Time after Time that the Company was dealing with the N.L.R.B. behind your back and there was nothing the I.B.E.W. could do about it." (App. 82)

The misrepresentation by IBEW referred to Presto's statement that it had arranged with the Government for an election. It claimed that it was a confession that previous accusations by the IBEW that the Company was dealing with the National Labor Relations Board behind the backs of the employees were true. The leaflet does not say that the Company was *trying* to deal with the Board. It says that it *was* dealing with the Board behind the backs of the employees. Therefore, the misrepresentation dealt not merely with the actions of Presto, but also with the action of the Board. Employees could only believe that both entities were aligned against the employees, for parties do not deal behind the back of another except to his detriment.

The Regional Director's treatment as a prohibited ex parte communication of the Company's request for assistance in dispelling the effects of the Union's representation to the employees of impropriety in the relationship between the Company and the Board placed the Company in an untenable position. It could not refute the Union's accusation. Under the circumstances, no statement by Presto could have had any effect on its employees' beliefs on this issue. The Regional Director was the official who had ruled upon the issues surrounding the election itself and had directed the election. The letter from him characterizing this as an unauthorized ex parte communication had the same effect upon employees as an *adjudication* that it was such, and thus within the misrepresentation made by the IBEW.

The Company's credibility, thus impaired, is a circumstance within which subsequent misrepresentations by the Union must be evaluated. Inasmuch as the impairment proceeded directly from the Regional Director's action in reliance upon the Board's Rules and Regulations, the correctness of his interpretation is an issue before this Court. Certainly, Presto cannot complain if he properly treated its letter as a prohibited ex parte communication.

As the promulgator of its own Rules and Regulations, an interpretation of the Board would be entitled to special weight. In this situation, however, the Board has not interpreted the provisions involved. Presto's Motion for Reconsideration of the Board's refusal to grant its Request for Review of the Supplemental Decision specifically requested an interpretation of these provisions. The Board declined to do so. It cannot be determined whether it declined to review the Supplemental Decision because it agreed with the Regional Director's interpretation or whether it considered an erroneous interpretation as not material to the outcome of the election.

Section 102.128 defines an unauthorized ex parte communication in three aspects: (1) the time or stage of the proceeding; (2) the subject matter of unauthorized communications; and (3) the persons to whom said communications are prohibited. Ex parte communications are unauthorized only "from the stage of the proceeding specified until the issues are finally resolved for the purposes of that proceeding under prevailing rules and practices." Section 102.128 (a) refers to the

pre-election proceeding under Section 9 (c) (1) or 9 (e). Therefore, this section refers to the hearing which was held in this proceeding under the authority of Section 9 (c) (1). That hearing was held, and the Decision and Direction of Election of the Regional Director had issued on June 30, 1967. It was at the time of the opening of this hearing that prohibitions of ex parte communications began. Insofar as the Regional Director and/or his legal assistants were concerned, there was no further activity with regard to the hearing under Section 9 (c) (1) subsequent to June 30, 1967.

Even if the prohibition extended through the action of the Board on Presto's Request for Review, the letter of July 28, 1967 would have not been a prohibited communication since the Board had refused the Request for Review on July 26, 1967. Accordingly, the letter was neither mailed nor received within the time period prohibited in Section 102.128 and 102.128 (a). It made no reference to any issues litigated at the hearing under Section 9 (c) (1), since it was concerned with activities of the Union in connection with the campaign itself. If the cited sections were construed to prohibit all communications with a regional director after hearing opened, there would be no necessity for Section 102.128 (b). The very existence of Section 102.128 (b) shows that the prohibition on ex parte communications in Section 102.128 (a) must terminate at some time, since otherwise there would be no necessity for the beginning of a new prohibition.

These provisions clearly have to do with the adjudicative aspect of the duties of various Board employees

and are designed to prevent attempts to influence improperly the decision-making processes of the Board and its constituent elements. The subject letter was directed to the Regional Director in his administrative capacity at a time when there was no issue pending before him for decision, and did not relate to his adjudicative functions under the Act.

Representations involving the Board during election campaigns partake of two aspects. In one, the misrepresentation may be that the Government favors the party making the assertion. See e.g., *N.L.R.B.* v. *Bata Shoe Company*, 377 F2d 821, 828 (4th Cir. 1967), cert. den. 389 U.S. 917, 19 L. Ed. 2d 265, 88 S. Ct. 238 (1967). Or, as in the present case, the declarant may represent that the other party is improperly involved with the Board. *N.L.R.B.* v. *Lord Baltimore Press, Inc.*, 370 F2d 397, 402-403 (8th Cir. 1966). In the latter situation, it would be expected that employees would turn to the union which exposed the company's chicanery. Its "electioneering significance . . . would naturally lie in its thrust at the integrity of the employer in respect to its labor relations . . . ." *Ibid*, p. 402.

In judging the effect of a misrepresentation, the second of the Board's criteria relates to the believability of the statement. As stated by Judge Aldrich in *N.L.R.B.* v. *A. G. Pollard Company*, 393 F2d 239, 242 (1968):

> "In judging the effect of a misrepresentation the test cannot be whether the speaker in fact had special knowledge, but must be whether

> the listeners would believe that he had. A misrepresentation by one having prime access to pertinent facts would be of no consequence if, for some reason, his listeners did not think him believable. On the other hand, a misrepresentation by one in fact having no knowledge at all would be effective if he was thought to be credible." (footnote omitted)

Believability is not exclusively the result of real or apparent special knowledge. In this case the Union's misrepresentation concerning the Employer's integrity received added credence from the treatment of the letter.

*2. The Misrepresentations on the Eve of the Election*

In a leaflet of August 7, 1967, IBEW made the claim that the Company had no pension plan. (Regional Director's Supplemental Decision). Presto in a handout on August 4 had listed the pension plan as one of its benefits. In the leaflet issued on August 10, 1967, the IBEW reiterated its false representation that there was no pension plan by stating that: "After 13 long years of business and This Company does not have a pension plan for its employees . . . ." The Union stated further: ". . . *NOW is The Time you should secure your Pension Plan, so you won't have to worry about it in the future.*" The leaflet continued with further representations that there is no pension plan.

The same leaflet contained several misrepresentations with regard to the insurance plan. It stated that a specific named employee had a claim for maternity benefits for which the insurance policy paid only $80.00 on the hospital bill and $90.00 on the doctor bill. The claim had not been filed. In fact, the employee was entitled to $100.00 on his doctor bill. The leaflet claimed that after payment that the employee still owed: "300 and some odd dollars." In fact, the hospital bill, before payment of benefits, amounted to $219.25, including television and a private room. The Doctor's bill was $175.00 so that the total bill was $394.25, and, after payment of benefits, the amount due was $214.25.

By giving the name of the employee and purporting to be authoritative and truthful, the employees could not have believed other than that this was factual. Most employees use semi-private accommodations and forego the luxury of television sets. The total maternity costs, before reimbursement by insurance, are normally about the same as those which the Union misrepresented to be the amount due after reimbursement.

The Union continued in the leaflet to misrepresent the insurance. It stated that the Company should be matching the amount paid by the employees. Speaking from its expertise as a representative of employees, it implied that a better policy would be secured if the Company would only pay as much as the employee. In fact, the Company was paying $2.58 per week for each employee's insurance.

This leaflet was distributed by the Union on August 10, within 24 hours of the election, and the Company did not have an adequate opportunity to rebut the false assertions. With regard to the employee used as an illustration, he did not file his claim on the doctor bill until September 11, 1967, and Employer did not know until then the facts.

This is a material misrepresentation of the kind which the courts have held to justify setting aside elections. "Purportedly authoritative and truthful assertions concerning wages and pensions . . . are not mere prattle; they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain." *N.L.R.B.* v. *Houston Chronicle Publishing Co., supra,* page 280. See also *N.L.R.B.* v. *Bonnie Enterprises, Inc.,* 341 F2d 712, 714 (4th Cir. 1965), in which the Court finds material representations regarding pension plans.

Of critical significance is the fact that the reference to the pension plan is a *repetition* of a misrepresentation on the very eve of the election and directly in the fact of a contradiction by Employer. In *Gummed Products Co.,* 112 NLRB 1092, 1094, the Board considered this a factor militating in favor of setting the election aside.

The Court in *Schneider Mills, Inc.* v. *N.L.R.B.,* 300 F2d 375, 380 (4th Cir. 1968) stated that "To the extent that previously made misrepresentations were repeated, we think that their vitiating effect on the validity of the election can be obviated only if the company had

a second opportunity to make an effective reply, whether the company availed itself of the opportunity or not."

The Regional Director found that the misrepresentations distributed on August 10, the day before the election allowed sufficient time and ample opportunity for the Employer to make answer had it cared to do so. Both *Hollywood Ceramics,* 140 NLRB 221 and *United Gypsum Company,* 130 NLRB 901 involve misrepresentations made by the union on the day preceding the election and at approximately the same amount of time before the actual balloting. In both cases, the Board relied upon the *absence* of sufficient time for the employer to make an *effective* reply.

Additionally, the specific insurance claims about which the Union made misrepresentations in its insurance leaflet were not presented to Employer until September 11, 1967 — a full month *after* the election. Employee concern is exclusively with how much will be paid by *them* after the use of insurance benefits. Thus, a policy is good or bad depending upon the degree to which it covers the amount of their claim. The misrepresentation was not simply concerned with the provisions of the insurance coverage. If Presto stated the amounts payable on an insurance claim, this would be a futile attempt to dispel the misrepresentations contained in a leaflet which falsely represented the amount still to be paid by individuals. The Company had neither the knowledge nor means to get the amount of Thomas Barnett's claim and/or the amount

to be paid by him after application of his insurance benefits.

The fact that the misrepresentations were of some matters of which Presto had knowledge does not prevent consideration of their effect upon the outcome of the election. See *N.L.R.B.* v. *Trancoa Chemical Corp.*, 303 F2d 456 (1st Cir. 1962). The misrepresentations included references to conditions at the employer's plant and the company made a reply, albeit ineffectively. *N.L.R.B.* v. *Bata Shoe Company, Inc., supra,* was set aside on a misrepresentation that the employer had union contracts in other locations.

*3. The Election Day Misrepresentations*

On the day of the election IBEW distributed handbills which misrepresented the amount and reason for the payment of funds to Presto's labor relations consultant. As pointed out on page 10 of the Regional Director's Supplemental Decision, services by him have been a part of Presto's personnel program since long before the Union ever began any organizational campaign in Jackson. His services for which the payments listed in the Union leaflet were made, were performed for five separate plants of Presto in widely dispersed geographical areas.

The Regional Director found that there was not an adequate opportunity for reply to this misrepresentation, but held that it came within the bounds of permissible misrepresentation. The Union's last minute leaflet purports to be "official records of the United

States Government." Employees were not in a position to evaluate the truthfulness or falsity of the Union's representation. They could only reasonably believe that the official Government records quoted represented not only the amount but also the purpose for which the funds were paid — that purpose claimed by the IBEW. The amount of money including fees and expenses totals $14,901.63, which would seem an enormous sum to the individual employees if paid for the purposes claimed by the Union. In fact, it is not disproportionate.

An employee believing it paid for the sole purpose of keeping a union from the Jackson plant would certainly accept it as factual and would be resentful.

The Board has held that a misrepresentation with regard to an employer's inequitable distribution of his funds is objectionable conduct and does have a substantial effect on employee votes in an election. *Halsey W. Taylor Co.*, 147 NLRB 16, 19. The employees could not evaluate the bulletin as solely election propaganda. They would certainly accept the representation of official fact under the guise of Government records.

Thus the criteria of *Hollywood Ceramics, supra,* at page 224 have been met. A substantial departure from truth was made at a time which prevented the other parties from making an effective reply and the misrepresentations, whether deliberate or not, reasonably may be expected to have had a significant impact upon the election. "The union would not have made such statements if it had not believed that they would

be material in influencing the vote. There was no time for rebuttal of the false statement." *Celanese Corporation* v. *N.L.R.B., supra,* page 226.

*4. The Excelsior Rule*

The First Circuit found that the rule of the Board requiring the furnishing of the names and addresses of employees by an employer for use of the union was invalid because it was not promulgated in accordance with the provisions of the Administrative Procedures Act. *Wyman-Gordon Co.* v. *N.L.R.B.,* 397 F2d 394, 68 LRRM 2483 (1st Cir. 1968), cert. granted,

In view of the fact that certiorari has been granted, the determination of its validity cannot be made in this proceeding. In the event, however, that the Supreme Court sustains the decision of the First Circuit, the forced compliance of Presto with this rule had a material and substantial effect on the outcome of the election. The intent of the Board's rule was to assist the Union in its organizational efforts. See *Excelsior Underwear, Inc., supra.* Therefore, the outcome of the election was affected by reason of their increased ability to see and convert Union adherents. If the rule is invalid, the assistance to the Union was the result of an improper exercise of the Board's authority and it should be grounds for setting the election aside.

*B. The Board's Order is Reasonable and Proper Under the Violations Found*

The extraordinary relief requested by the IBEW in

this case has been granted in only those cases involving massive violations by an employer. This Court, in granting enforcement of most of the Board's order in *IUE* v. *NLRB*, 127 U.S. App. D.C. 303, 383 F. 2d 230 (D.C. Cir. 1967), noted in footnote 4 that giving access of one hour to a union in the company's plant was "fairly strong medicine." The Court approved such a remedy because of the "aggravated circumstances" in that case.

As set forth in the brief of IBEW, the Union's efforts to organize the employees of Presto has extended over a period of more than two years. During that period, in a plant in which there were more than 600 employees, the only violations of the Act found by the Board, other than the technical refusal to bargain in this case, consisted of three conversations, involving two minor supervisors, over two years ago. Under these circumstances a remedy which does more than pass upon the validity of the election and confirm the certification of the union would be punitive and a punishment of Presto solely for its use of the procedures provided by the Act for reviewing Board election decisions. This Court has recognized the difficulty of requiring the payment of money as a part of the remedy in a refusal-to-bargain case. *UAW* v. *NLRB*, U.S. App. D.C. , 392 F. 2d 801, 810 (1967), cert. den. 392 U.S. 906, 20 L. Ed. 2d 1364 (June 10, 1968). It is apparent from the statute that any bargaining order requiring the giving of a pay increase to employees is the forcing of a concession rather than the enforcement of a concession already made and that it is unambiguously prohibited by the terms of Section 8(d).

Stripped of nonessentials, the Union's argument is essentially that the passage of time may have dissipated its majority status. Existing remedies adequately protect its interest in such event. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 704-5, 64 S. Ct. 817, 88 L. Ed. 1020 (1944). As pointed out by this Court, "If a union loses its majority . . . because the company wrongfully refused to bargain with it, restoration of the status quo calls for Board recognition of the union." *Local 57, International Ladies Garment Workers Union, AFL-CIO* v. *NLRB*, 126 U.S. App. D.C. 81, 87, 374 F. 2d 295, 301, cert. den., 387 U.S. 942, 87 S. Ct. 2078, 18 L. Ed. 2d 1328 (1967). In other words, the union is placed in its status as the collective bargaining representative of the employees with its full rights and responsibilities just as if the employer had recognized it on the day following the election.

## CONCLUSION

Presto respectfully requests the Court to find that the unfairness of the Union's campaign prevented the holding of a valid election free of improper influence. Accordingly, it is requested that the Court would decline enforcement of the Board's order as not supported by substantial evidence on the record as a whole.

In the event the Court finds that a bargaining order is appropriate, the Board's order is reasonable and proper under all the circumstances and it is requested that it be enforced in accordance with its existing terms.

Respectfully submitted this 5th day of December, 1968.

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**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing brief have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

Andrew C. Partee, Jr.

## APPENDIX

### Statutes Involved

National Labor Relations Act, as amended, 29 U.S.C. § 151, *et. seq.*, 61 Stat. 136:

> Section 8 (a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * *
>
> Section 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a pro-

posal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * *

Section 10 (f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 31 F.R. 13850:

Section 102.126 *Unauthorized communications.* — No person who is a party to, an agent of a party to, or who intercedes in, an on-the-record proceeding of the types defined in section 102.128, shall make an unauthorized *ex parte* communication to Board agents of the categories designated in that section, concerning the disposition on the merits of the substantive and procedural issues in the proceeding.

* * * *

Section 102.128 *Types of on-the-record proceedings; categories of Board agents; and duration of prohibition.* — Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of section 102.126 shall be applicable in the following types of on-the-record proceedings to unauthorized *ex parte* communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a preelection proceeding pursuant to section 9 (c) (1) or 9 (e), or in a unit clarifica-

tion or certification amendment proceeding pursuant to section 9 (b), of the act, in which a formal hearing is held, communications to the regional director and members of his staff who review the record and prepare a draft of his decision, and members of the Board and their legal assistants, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to section 9 (c) (1) or 9 (e) of the act, in which a formal hearing is held, communications to the hearing officer, the regional director and members of his staff who review the record and prepare a draft of his report or decision, and members of the Board and their legal assistants, from the time the hearing is opened.

* * * *

Section 102.33 — *Receipt of prohibited communications; reporting requirements.* — (a) Any Board agent of the categories defined in section 102.128 to whom a prohibited oral *ex parte* communication is attempted to be made shall refuse to listen to the communications, inform the communicator of this rule, and advise him that if he has anything to say it should be said in writing with copies to all parties. Any such Board agent who receives a written *ex parte* communication which he has reason to believe is prohibited by this subpart shall promptly forward such communication to the

Office of the Executive Secretary if the proceeding is then pending before the Board, to the chief trial examiner if the proceeding is then pending before a trial examiner, or to the regional director involved if the proceeding is then pending before a hearing officer or the regional director. If the circumstances in which the unauthorized communication was made are not apparent from the communication itself, a statement describing those circumstances shall also be submitted. The executive secretary, the chief trial examiner, or the regional director to whom such a communication is forwarded shall then place the communication in the public file maintained by the agency and shall serve copies of the communication on all other parties to the proceeding and attorneys of record for the parties. Within 10 days after the mailing of such copies, any party may file with the executive secretary, the chief trial examiner, or regional director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the unauthorized communication.

Nos. 22,051 and 22,313

# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

and

PRESTO MANUFACTURING COMPANY,
*Intervenor.*

PRESTO MANUFACTURING COMPANY,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

On Petitions to Review and Cross-Application
to Enforce an Order of
The National Labor Relations Board

# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD



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## AUTHORITIES CITED

Cases:

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No. 22,051

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**On Petitions to Review and Cross-Application to Enforce an Order of the National Labor Relations Board**

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## ISSUES PRESENTED FOR REVIEW

The questions presented, as formulated in the pre-hearing conference stipulation (J.A. 172-175)[1] are as follows:

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[1] J.A. refers to those portions of the record printed as a joint appendix to the briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

A. In case No. 22,313, the issue is:

Whether the Board properly certified the Union as the exclusive bargaining representative of the employees in an appropriate unit.

B. In case No. 22,051, the issue is:

Whether the Board's order is reasonable and proper.

These cases have never previously been before this Court.

## COUNTERSTATEMENT OF THE CASE

Case No. 22,313 is before the Court upon the petition of Presto Manufacturing Co. (hereafter called "the Company") to review and set aside an order of the National Labor Relations Board issued against it on June 24, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*). The Board has cross-applied for enforcement of its order. The Board's Decision and Order (J.A. 170-171) are reported at 172 NLRB No. 30. In Case No. 22,051 the International Brotherhood of Electrical Workers, AFL-CIO, (hereafter "the Union") has petitioned to review and modify the Board's order insofar as it denied relief to the Union, the charging party before the Board. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act.

### I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union certified by the Board, following the representation proceedings described below, as the exclusive representative of an appropriate unit of the Company's employees. The facts underlying this finding are summarized below:

## A. The Representation Proceeding

On May 19, 1967,[2] the Union, pursuant to Section 9(c) of the Act, filed a representation petition with the Board requesting an election for certification as the exclusive representative for the production and maintenance employees at the Company's Jackson, Mississippi, plant (J.A. 1-3). The Regional Director issued a Decision and Direction of Election on June 30 (*Ibid.*). In the election, held August 11, the Union received 334 votes, 245 votes were cast against union representation and 29 ballots were challenged (J.A. 26).

Thereafter, the Company filed timely objections to the election (J.A. 19-25). The Regional Director, pursuant to Section 102.69(c) of the Board's Rules and Regulations (29 CFR 102.69(c)), conducted an investigation of the issues raised by the Company, affording all parties an opportunity to submit evidence.[3] The investigation disclosed no material issues of fact warranting a hearing, so none was held. Finding the Company's objections to be without merit, the Regional Director issued a Supplemental Decision and Certification of Representative on November 9, certifying the Union as the bargaining representative of the employees in the unit (J.A. 26-44). In overruling the objections which Presto presses before this Court,[4] the Regional Director found as follows:

1. The Company claimed in Objection No. 10 that the employees "were coerced, restrained and intimidated, and their rights were violated by

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[2] Hereafter all dates are 1967, unless otherwise specified.

[3] The Company submitted 34 exhibits—the campaign literature of both sides—with its objections to the election, as well as an affidavit from its personnel director (J.A. 45-99).

[4] The objections raised before the Board but abandoned here (Co. Br. 3, n. 1), are not discussed in our brief.

the Employer's having been required to submit a list of names and addresses of all employees eligible to vote to the Board, which was, in turn, submitted to the Union . . . " This objection was overruled because the production of the list was validly required by the election rule announced by the Board in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966) (J.A. 31).

2. In regard to Objection No. 11, the Regional Director found that the statements objected to by the Company in two pieces of campaign literature constituted typical campaign propaganda "of the kind the Board declines to police or censor, but, rather leaves the evaluation thereof to the good sense of the voters" (J.A. 34; 82, 98). Thus, in Objection 11A, the employer complained of the Union's handbill (J.A. 82) alleging, *inter alia,* that "the Company is dealing with the NLRB behind your backs." The Regional Director observed that this statement was made in express response to an earlier Company handbill asserting that while the employees were on vacation, it (the Company) had "arranged with the Government to hold an election" (J.A. 52), and complained that the Union's attempt to secure an earlier election date had been frustrated by Company opposition (J.A. 82). Moreover, the Regional Director found that the three week interval before the election left the Company ample time to reply to the handbill. In making this finding, the Regional Director rejected the Company's claim that he had prejudiced the Company's ability to reply by forwarding to the Union, pursuant to the Board's rules governing *ex parte* communications (Board Rules & Regulations Sec. 102.126, 102.128, 102.129, 29 CFR 102.126, 102.128, 102.129), a copy of the Company's letter to him protesting the Union's language (J.A. 35; 83-86).

In objection 11B, the Company protested the Union claim that money paid by the Company to a personnel consultant, whom the Union styled a "union buster", was paid to keep the Union out of the plant. The Regional

Director also found this statement to be permissible campaign propaganda. The basic facts in the Union's handbill were truthfully shown in a reproduced Labor Department form, and the objectionable matters were obvious conclusions and inferences drawn by the Union which the employees could appraise, and which were not so misleading as to require setting aside the election (J.A. 35-36; 98).

3. Finally, the Regional Director dismissed Objection 14, in which the Company claimed that the Union's statements in two handbills about the Company's insurance and pension plans for employees were misleading (J.A. 40-43; 93, 97). The Company objected (1) to the Union statement that the employees had no pension plan, whereas the Company had stated in its handbill that the Company offered "a constantly improving retirement program at no cost to the employees" (J.A. 74); and (2) to the Union's misstatement that a particular employee had had a hospital bill of about $470, to which the Company's insurance plan only contributed $170, whereas in fact the total bill had been $394.25 of which the Company had paid $180; and (3) to the Union's implication that the Company's contribution to the insurance plan perhaps did not equal the employees' because, if it did, the employees " . . . should be able to get a real good policy" (J.A. 97).

In dismissing this objection, the Regional Director found that the employer had ample time to reply to both pamphlets, and had fully presented its position to the employees. He also pointed out that "the Employer knew better than anyone else the provisions of such insurance and pension plans," and was consequently able effectively to answer the Union's statements (J.A. 42-43).

### B. The Unfair Labor Practice Proceeding

Pursuant to the certification, the Union requested recognition on November 15 and thereafter; the Company refused recognition on the basis that the certification was invalid (J.A. 157). The Union then filed the charge in the instant case and the Regional Director issued a complaint; the Company in its answer denied any violation of Section 8(a)(5).

On March 5, pursuant to the motion of the General Counsel, the Trial Examiner issued an order to show cause before March 20, 1968, why the motion for summary judgement should not be granted; on April 3, 1968, he granted the motion on the basis that the Company, in its response to the order to show cause, proffered no newly discovered evidence and he was therefore bound by the findings of the Board in the earlier representation case (J.A. 158; 145-147).[5]

Both the Union and the Company filed objections to the Trial Examiner's Decision. The Company objected both to the underlying certification and the summary judgment; the Union requested the Board to consider imposing additional remedies on the Company for the refusal to bargain. The Board, however, rejected the objections filed by both parties and adopted the Trial Examiner's Decision (J.A. 170-171).

## II. THE BOARD'S ORDER

The Board's order (J.A. 171) requires the Company to cease and desist from the unfair labor practices found and, on request, to bargain collectively

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[5] The Company's response to the Order to Show Cause not having been received until March 21, 1968, the Trial Examiner's Decision originally issued without reference to it on March 27, 1968; thereafter the record was reopened and the late filed response was considered, and an Amended Decision was issued (J.A. 157).

with the Union as the exclusive representative of the employees, and to post appropriate notices.

## ARGUMENT

### I. THE BOARD PROPERLY OVERRULED THE COMPANY'S OBJECTIONS TO THE ELECTION

The sole issue raised by the Company's petition for review is whether the Board's certification of the Union is valid for, if so, the Company's admitted refusal to bargain violates Section 8(a)(5) and (1) of the Act. The Company contends that the Board should have set aside the election both because of pre-election statements by union representatives which allegedly interfered with the employees' free choice; and because the Union was improperly assisted by the Board's *Excelsior* rule, under which the Company was obliged to give the names and addresses of its employees to the Union. We show below that neither of these contentions warranted setting aside the election and, accordingly, the Board properly certified the Union.

#### A. The Union's Pre-election Statements

As the Company concedes, the question presented here – whether to set aside an election because of pre-election statements – is a matter which rests within the sound discretion of the Board. For, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" (*N.L.R.B. v. A.J. Tower,* 329 U.S. 324, 330 (1946)). See also *N.L.R.B. v. Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); *N.L.R.B. v. National Truck Rental Co.,* 99 U.S. App. D.C. 259, 239 F.2d 422, 425-426 (1956), cert. denied, 352 U.S. 1016. The question before the Court is thus not whether substantial evidence supports the Board's determination that the

election was validly conducted, but whether the Board abused its discretion in determining that the conduct of which the employer complains did not, in all the circumstances, make a free and fair election impossible. *N.L.R.B. v. National Truck Rental, supra.*

The Board, seeking to "balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign," has formulated certain guidelines as a means to determine whether a secret ballot election should be set aside. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224 (1962); *United States Gypsum Company*, 130 NLRB 901, 904-905 (1961). In striking this balance, the Board will overturn an election only where there has been a misrepresentation which "(1) involves a substantial departure from the truth, (2) at a time which prevents the other parties from making an effective reply, (3) so that the misrepresentation . . . may reasonably be expected to have a significant impact on the election" (*Hollywood Ceramics Co., supra*, at 224, cited with approval in *Steelworkers v. N.L.R.B. (Luxaire Co.)*, . . . U.S. App. D.C. . . . , 393 F.2d 661, 664 (1968). Moreover, even where a misrepresentation is substantial, the election will not be set aside if the employees are "in a position to know the truth of the fact asserted" *id.*, at 223. Finally, the burden is not on the Board to establish the validity of the election; rather, the objecting party must show with specific evidence that the election was not fairly conducted. *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123, 124 (1961). The burden thus assumed is a "heavy" one (*Shoreline Enterprises v. N.L.R.B.*, 262 F.2d 933, 942 (C.A. 5, 1959)), for "the results of a secret ballot election . . . should not be lightly set aside." *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). We respectfully submit that the Company has not met that burden.

1. The Company objects to the Union's handbill distributed July 20 (three weeks before the election), which states in relevant part:

> Now lets take a look at Mr. Hall's so-called Handbill that was passed out on Monday. In the Second Paragraph he said, while you were away the Company arranged with the Government to hold an election.
>
> Well as you well know the I.B.E.W. wanted the election to be held the last part of May, but the Company said no. We have told you people time after time that the Company was dealing with the N.L.R.B. behind your backs, and there was nothing the I.B.E.W. could do about it (Ex. E-22).

The gist of the Company's complaint is that the phrase, "The Company was dealing with the N.L.R.B. behind your backs," aligned the Board with the Company in a serious charge of misdealing which could only influence employees to vote for the Union. Additionally, the Company claims that it was unable to reply to this charge in the intervening three weeks before the election because the Regional Director improperly disclosed to the Union, as a prohibited *ex parte* communication, the Company's letter to the Regional Director protesting the Union's charge. The Company argues that this action of the Regional Director further served to confirm the Union's claim that the Company and the Board were dealing with each other against the interests of the employees and the Union, and would have rendered futile any attempt by the Company – had one been made – to rebut the accusation.

Every aspect of this objection by the Company is, we submit, patently without merit. As the Regional Director noted (J.A. 32, n. 3, 34-35) and the Union handbill reveals, the "dealing behind your backs" statement was made in response to the Company's claim to the employees that "while you were away we arranged with the government to hold an election August 11th to decide whether you want or do not want the union" (J.A. 52). Thus, the original claim that the Company and the government were "aligned" came from the employer itself, not the Union.

The handbill also makes clear that the Union statement dealt only with the timing of the election, an issue which had been raised in earlier Union handbills calling attention to the Company's refusal to agree to a consent election and noting that the Board's agreement to an extension of time for the Company to file briefs had resulted in delay of the election until after the plant's summer vacation (J.A. 79-80). Thus, the factual claim made by the Union consisted essentially of the statement that the Board accepted the Company's desires for an election date over the objection of the Union – a misrepresentation which, we submit, the employees could properly evaluate as campaign propaganda, especially in light of the employer's original alignment of itself in favorable terms with the Board. No statement remotely comparable to that made in *N.L.R.B. v. Lord Baltimore Press,* 370 F.2d 397, 402-403 (C.A. 8, 1966) (Co. Br. 16), where the Union charged that the Board processes had been successfully subverted by the Company having "bought off" unfair labor practice charges, was made in this case. In short, the phrase objected to is part of the species of "exaggerations, hyperbole and appeals to the emotions of which election campaigns are made," *Schneider Mills v. N.L.R.B.,* 390 F.2d 375, 379 (C.A. 4, 1968); *Baumritter v. N.L.R.B.,* 386 F.2d 117, 120 (C.A. 1, 1967); Bok, *Regulating NLRB Election Tactics,* 78 Harv. L. Rev. 38, 88 (1964).[6]

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[6] *N.L.R.B. v. Bata Shoe Co.,* 377 F.2d 821, 828 (C.A. 4, 1967), cert. denied, 389 U.S. 917 (1967), is also factually different from this case since the statements there, as found by the Board, were clearly misrepresentations of the function of the Board, involving statements that the Board and the Union together would protect the benefits employees had under contracts with the Company. Moreover, the Court found that these misrepresentations did not interfere with the fairness of the election in light of the fact, also present in the instant case (see discussion below, pp. 11-12), that the employees had previous experience with Board elections and the Company had ample opportunity to reply.

Moreover, the Company had ample time – from July 20 to August 11 – to rebut the offensive implication of the phrase to which it objects, and to give its version of the facts surrounding the setting of the election. The Regional Director's action treating the Company's letter of protest as an *ex parte* communication and forwarding it to the other parties, cannot reasonably be said to have precluded the Company from answering the Union's assertions. Whether or not the Regional Director properly treated the letter as a prohibited *ex parte* communication, his action in so classifying it was irrelevant to the Company's opportunity to respond to the underlying "misrepresentation" of the Union handbill.

The Company's underlying argument is that its credibility was impaired by the Regional Director's treatment of the letter as *ex parte:* "The letter from him characterizing this as an unauthorized *ex parte* communication had the same effect upon employees as an *adjudication* that it was such, and thus within the misrepresentation made by the IBEW" (Co. Br. 13). But nothing in the Regional Director's letter – which merely states that he considers the Company communication to be *ex parte* under the relevant rules[7] – implies any approval of the Union's statements in the handbill which the letter protested. In fact, the Regional Director's rejection of the Company's attempt to deal directly with him, without notifying the other parties, belies the existence of any dealing behind the backs of the employees by the Company and the Board. Indeed, the Company's claim that the classification of the letter as *ex parte* made the Regional

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[7] The letter states "Pursuant to Section 102.133 of the Board's Rules and Regulations, Series 8, as amended, the undersigned hereby serves upon all parties a copy of the attached letter and attachment received by the undersigned on July 31, 1967, which the undersigned deems to be an *ex parte* communication within the meaning and intent of Section 102.126, 102.128(a) and 102.129(a) of said Rules and Regulations." (J.A. 86)

Director appear to the employees as the partisan of the Union not only assumes that the employees knew of the letter – there is no such showing in the record – but also assumes that the employees would misunderstand the letter.

In any event, even if the Company's ability to reply was hampered by the Regional Director sending the Union a copy of the Company's letter as a prohibited *ex parte* communication, we submit that the Regional Director acted correctly under the Board's rules.[8] The letter was written subsequent to the initial hearing on the representation petition and issuance by the Regional Director of his Decision and Direction of Election, but prior to the election and certification of the results thereof. Section 102.128 prohibits *ex parte* communications in certain types of on-the-record proceedings, "from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices." Subsection (a) of Section 102.128 makes that applicable "in a pre-election proceeding pursuant to Section 9(c)(1) . . . , in which a formal hearing is held . . . , from the time the hearing is opened." Subsection (b) makes the prohibition of Section 102.128 applicable "in a post-election proceeding pursuant to section 9(c)(1) . . . , in which a formal hearing is held, . . . from the time the hearing is opened."

The Company construes subsections (a) and (b) as dealing with two mutually exclusive categories, the one dealing with pre-election proceedings only, and the other with any post-election proceedings which might be

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[8] The Company concedes that its objection is without merit if the Regional Director's action was proper: "Certainly, Presto cannot complain if he properly treated its letter as a prohibited *ex parte* communication" (Co. Br. 14). The relevant sections of the Board's rules are set forth in the appendix to the Company's brief.

conducted. Such a construction is incorrect. Subsections (a) and (b) merely define the point in time when a representation proceeding becomes "on the record" and, out of considerations of fairness, *ex parte* communications are thereafter prohibited until the case is closed. For, "the issues [raised in a pre-election hearing] are finally resolved by the Board,"[9] not by the issuance of a Decision and Direction of Election, but by the final certification of the results of the election. See *Inland Empire District Council v. Millis,* 325 U.S. 697, 707 (1945); *N.L.R.B. v. Rohlen,* 385 F.2d 52, 56-57 (C.A. 7, 1967). The Company asserts that if the prohibition against *ex parte* communications in pre-election proceedings was intended by the Board to remain in effect until a certification issued, there would be no need for subsection (b), which prohibits *ex parte* communications in post-election hearings. The short answer to this argument is that in most representation proceedings, the "on-the-record" pre-election hearing has been waived by the parties.[10] Subsection (b) was intended to apply to those representation cases where no pre-election hearing has been held, but a post-election "on-the-record proceeding" has been ordered to consider challenged ballots or objections to conduct allegedly affecting the election. In sum, subsections (a) and (b), read together, are designed to impose a ban on *ex parte* communications for the duration of a representation case as soon as the first "on-the-record proceeding" is begun.[11]

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[9] Quoting from Section 102.128.

[10] According to the latest available figures, of 8,392 elections conducted in Fiscal Year 1966, 6,553 were conducted on the basis of stipulations and consent agreements which waive the pre-election hearing and go to an election without the issuance of a Decision and Direction of Election. Thirty-First, Annual Report of the National Labor Relations Board, p. 202, Table 11 (G.P.O., 1967).

[11] This construction is confirmed by subsection (c), which bans *ex parte* communications upon issuance by the Regional Director of his post-election report or decision, if no formal hearing has been held.

Thus, the Regional Director's action in serving the Company's letter on the other parties was proper under the Board's rules and cannot serve as a basis for setting the election aside. Besides, as we have already shown, under no circumstances could sending the Company's letter to the Union reasonably be said to have impaired the Company's ability to reply to the Union's charges.

2. The Company's second objection is that the Union, in two leaflets distributed four days and one day, respectively, prior to the election, falsely represented to the employees that their employer had no pension plan for them and that its insurance plan was inadequate. On August 7, the Union distributed the first challenged leaflet, which asked the Company a series of rhetorical questions. The first two of these were (J.A. 93):

> 1. WHY Don't You Have a Pension Plan?
> 2. WHY Don't You Have a Decent Insurance Program?

Then, on August 10, the Union distributed the other challenged leaflet which said, *inter alia* (J.A. 97):

> Pension Plan??
>
> What Pension Plan?? I didn't Know That you had one. Have you ever seen a copy of your pension Plan? After 13 Long Years of business, and This Company does not have a pension plan for its employees, and They are telling you that you have not been mistreated?? * * *
>
> Insurance Plan??
>
> Yes, You have an Insurance Plan, But What Good Is It?? Have you ever had to use it? For those that have used it, You Know How Lousy It Is. But for those of you that have not used it, Let me give you some examples!

1. Ask Charles Tucker how much it cost him when he had to use his insurance!

2. Ask George Kennedy what he still owes, after The Presto Insurance Policy Paid Off!

3. A most recent case, Ask Thomas Barnett about his Policy. His wife just had a Baby, and The Presto Insurance Policy Paid a Lousy 80 dollars on the Hospital Bill, and A Lousy 90 Dollars on The Doctor Bill. He still owes 300 and some odd dollars. Where is he going to get it? He sure doesn't make enough at Presto to make ends meet.

* * *

I understand that The Company is supposed to match the same amount that you pay. That would make $1.70 from you, and $1.70 from the Company, which means The Insurance Company should be receiving $3.40 per week. And for $3.40 per week you should be able to get a Real Good Policy.

I wonder If The Company is paying Their Share? It might be worth looking into.

* * *

With regard to the pension plan, it is evident that the Union said what it said in order to force the Company to disclose the terms of its pension plan to the employees. For, in an earlier handbill dated July 27, the Union challenged the Company to put in writing an alleged promise its representative had made to the employees that they would be given "an Improved Pension Plan If they Vote The Union Out." To this, the Company only responded with handbills on July 28, August 4, and August 7 which merely listed the pension plan as an existing benefit; they did not describe the plan in any detail or list any of its provisions, except to say

that it was "constantly improving" and "at no cost to the employees" (J.A. 74). Moreover, when the Regional Director investigated this objection, the Company's own personnel director told the investigator "that when the [pension] plan was instituted in 1961, Employer's president announced it to the employees; and, that the plan is explained to all new employees upon their being hired" (J.A. 42). The Company obviously thought that this information was sufficient, for it did not repeat the information during the campaign. Under these circumstances, the Board properly rejected the claim the Company makes now, that the employees were probably misled by the Union's rhetorical assertion that the employees had no pension plan.

Similarly, the context of the insurance plan "misrepresentation" in the disputed leaflets shows that the Union was really asking the employees to evaluate their own insurance plan as they knew it. The Company objects to one of the three examples cited by the Union in its August 10 leaflet to show the inadequacy of the insurance, on the grounds the figures given were incorrect. The Union asserted that a named employee's wife "just had a Baby, and the Presto Insurance Policy Paid a Lousy 80 dollars on The Hospital Bill, and a Lousy 90 dollars on The Doctor Bill. He still owes 300 and some odd dollars." Before the Board, the Company asserted, and the Board accepted as true, that the Company insurance actually paid $100 to the doctor, and that the employee's total out-of-pocket expense amounted to $214.25. The cases cited by the Company in its brief suggests the insubstantiality of the misrepresentation here. The Union claimed the Company had paid $170 out of approximately $470; the actual figures showed the Company paid $180 out of just under $400. In other words, while the Union asserted that the Company paid 36 percent of the employees' costs, the Company actually paid 9 percent more. Moreover, the Union named the claimant involved, invited his fellow employees to ask him about

his experience, and called upon them to examine their own experiences with the Company's insurance. Clearly, the handbill, while seeking to denigrate the existing insurance, did urge the employees to check the facts and judge for themselves. In contrast, the misrepresentations in *N.L.R.B. v. Bonnie Enterprises,* 341 F.2d 712 (C.A. 4, 1965), cited by the Company, involved not only union statements about contracts it had negotiated at other plants, but also claims that it had obtained pension plans, vacations, insurance programs and other benefits at those plants when they had not in fact done so.[12] And in *N.L.R.B. v. Houston Chronicle,* 300 F.2d 273 (C.A. 5, 1962), the misrepresentations concerned matters about which the employees would expect the union to have special knowledge. Those were cases, therefore, where the employees were not in as good a position as the Presto employees to make an independent judgment, but were called upon to rely on the union's word.

The Company also objects that the Union implied in its August 10 handbill that the Company was not paying as much in insurance premiums as it claimed to be. This argument again protests a comparatively innocent propaganda exaggeration. The Union directly claimed neither that the Company was obligated to equal employee contributions, nor that it was not meeting this obligation. Rather, the Union implied that it could get a better insurance plan for that amount of money – a normal campaign claim – and asked the employees to consider the adequacy of the benefits they had been receiving. In this connection, the Union invited the employees to ask the Company what the facts were about insurance plan contributions, again, in effect, challenging the Company to set forth the contents of the plan. Once more, we submit, this alleged misrepresentation was not such as to

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[12] Cf., *Pepperell Mfg. Co. v. N.L.R.B.,* 403 F.2d 520 (C.A. 5, 1968). (approximately 10 percent misrepresentation of wage rates at other plants held insubstantial).

render a fair election impossible, but was simply a typical, run-of-the-mine campaign statement which the employees were fully capable of appraising.

But even viewing the foregoing assertions by the Union as direct misrepresentations, they do not warrant setting the election aside. For, it is settled Board policy, approved by the courts, not to set aside an election because of campaign misrepresentations unless the Board finds it likely that such utterances had a significant impact on the election. *Linn v. United Plant Guard Workers,* 383 U.S. 53, 60-61 (1966); *Russell-Neuman Mfg. Co., Inc.,* 158 NLRB 1260, 1264 (1966), enf'd *per curiam* C.A.D.C., April 12, 1967, Nos. 20,217 and 20,415 (unreported); *N.L.R.B. v. Red Bird Foods, Inc.,* 399 F.2d 600 (C.A. 7, 1968); *Anchor Mfg. Co. v. N.L.R.B.,* 300 F.2d 301, 303 (C.A. 5, 1962). The "principle is not that when false statements are made they constitute interference with free choice, but that *when* false statements are made *which* constitute an interference with free choice, for or against a bargaining representative, an election should be set aside." *Anchor Mfg. Co., supra,* 300 F.2d at 303, emphasis in the original. The alleged misrepresentations here were about the Company's own plans, about which the employees had personal knowledge against which to measure the claims of each side. This is a factor which the Board and the courts have considered of the utmost importance in determining whether the employees could have been misled. *Baumritter v. N.L.R.B.,* 386 F.2d 117, 120 (C.A. 1, 1967); *Macomb Pottery Co. v. N.L.R.B.,* 376 F.2d 450, 453 (C.A. 7, 1967); *Hollywood Ceramics, Inc., supra,* 140 NLRB at 224.[13] Accordingly, where, as here, the alleged misrepresentations were made in the context of a campaign which "[gave] the

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[13] In contrast, in all the cases cited by the Company (Co. Br. 19-20), the misrepresentations made were about conditions at plants other than that at which the election was being held and about which the party making the misrepresentation was clearly expected by the employees to have superior knowledge. Cf., *N.L.R.B. v. A.G. Pollard,* 393 F.2d 239, 242 (C.A. 1, 1968).

electorate a fair opportunity to appraise the issue[s]" the election will not be set aside. *Steelworkers v. N.L.R.B., supra,* 393 F.2d at 664.

Moreover, not only were the statements themselves unobjectionable but the Company, contrary to its claim, had ample time to reply to both leaflets. The Company does not contend that it had no time to reply to the August 7 handbill, but argues instead that it could not reply to their reiteration on August 10. This contention is without merit. According to the Company's personnel manager, Vernon Lange, he received a copy of the August 10 handbill at 6:45 that morning (J.A. 43, n. 10). Since the disputed statements contained therein were about matters previously raised and related to matters directly within the Company's knowledge – pensions and insurance – the Company needed virtually no time to prepare a rebuttal to the Union's claims.[14] Here, as in *N.L.R.B. v. Houston Chronicle, supra,* 300 F.2d at 279, one day was ample to prepare a response. Contrast the situation here with those in the cases upon which the Company relies in its brief, pp. 19-20, which involved misstatements about which the opposing party would have had difficulty checking and rebutting in the day or two remaining before the election.

In sum, nothing the Union said about the Company's insurance and pension plans could have so misled the employees as to warrant setting the election aside. If the employees had any misapprehensions about these matters resulting from the Company's failure to answer in detail the Union's assertions, it is the Company's own fault, for the Company did have an adequate opportunity to respond.

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[14] Even where the Company claimed it did not have the facts – about the individual payments made to the employee for his wife's hospitalization – the Company did have the facts about how the payments would be made under the insurance plan. The Company could have attempted to contradict the Union's claims by setting forth how it would pay on a similar claim.

3. The final misrepresentation which the Company claims should have required the Board to set the election aside, was contained in the Union's handbill the morning of the election, to which the Company concededly had no chance to reply. Reproducing a page from a report the parent Company, National Presto Industries, Inc., had filed with the United States Department of Labor, the handbill showed the amounts of money paid by the parent to a labor relations consultant during the year 1966 (J.A. 35-36; 98). The Company's two principle objections are (1) that the handbill did not indicate that the money paid was in fact not all paid for work at the Jackson plant, but was for work at the Jackson plant and four others; and (2) that the handbill stated that the labor consultant "is what we call the Union Buster" and that "Presto is paying this man to keep the Union out of the Plant."

Again, we submit that the Regional Director was correct in concluding that this was permissible campaign propaganda which the employees could properly evaluate. The handbill stated that Robey was an outside labor consultant, then stated as the Union's *opinion* that he was a union buster, not as a fact supported by U.S. Government figures. And the handbill accurately told the employees that Robey had been around the Jackson plant performing services for the Company in the final week before the election. The actual figures taken from the Labor Department were accurate and did reveal that the amounts paid were paid by "National Presto Industries, Eau Claire, Wisconsin," not solely by the Jackson plant. Under these circumstances the employees were clearly aware that it was the Union's opinion, not fact, that the Company was spending substantial amounts of money to an outsider in its admitted efforts to keep the Union out of the plant.[15]

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[15] In the handbill, the Union called the employees' attention to the fact "that the above fees and expenses was for the year 1966. . . ," and "wonder[ed] how much they have paid him this year?" (J.A. 98).

The only case cited by the Company, *Halsey W. Taylor Co.*, 147 NLRB 16, 19 (1964), effectively disposes of the contention that the Union's misrepresentation – if such it be – of the amount disbursed for use at the Jackson plant was sufficiently gross to require setting aside the election. In that case, the Board found objectionable a representation to the employees that a company with earnings of $3,000,000 disbursed $2,350,807 to its stockholders, when, in fact, it had disbursed approximately 2% of that figure. Here, even assuming that substantial parts of the money spent were spent for services at other plants in 1966, the magnitude of the misrepresentation does not approach that in *Taylor.* Finally, the Union did not directly claim that the money was for services only at the Jackson plant; it claimed, accurately, that the parent corporation, with a well-publicized opposition to the Union, found it worthwhile the year before to spend the stated amount of money for labor relations services – services which the Union believed were for the object of defeating union organizing campaigns. In short, the extent of the Union's exaggeration of both the purpose of hiring the labor relations consultant and the amounts paid him was not so grossly disparate as to require setting aside the election.

### B. The List of Employee Names and Addresses

The Company contends that the election was invalid because the Union was provided with a list of employee names and addresses which the Company had supplied the Regional Director pursuant to the Board's *Excelsior* rule (promulgated in *Excelsior Undrwear, Inc.*, 156 NLRB 1236 (1966)). In support of this contention, the Company now relies on *Wyman-Gordon Co. v. N.L.R.B.*, 397 F.2d 394 (C.A. 1, 1968), cert. granted, 393 U.S. 932. In *Wyman-Gordon,* the First Circuit held that

the *Excelsior* rule is unenforceable because it was not promulgated in conformity with the provisions of Section 4 of the Administrative Procedure Act (5 U.S.C. Sec. 553).[15a] Before the Board, however, the Company did not rely on this ground, but simply challenged the substantive validity of the *Excelsior* rule. Thus, Section 10(e) of the Act bars the Company from asserting here that the procedures used by the Board in adopting and promulgating that rule were improper.[16] In any event, even if the rule was improperly promulgated, and even if Section 10(e) did not bar consideration of that issue here, the Company waived its right to complain of the Board's non-compliance with the APA when it voluntarily complied with the rule and produced the list. As the First Circuit itself said in a similar situation where an employer belatedly sought to rely on *Wyman-Gordon,* "Not being alert to its rights, it missed the boat, or more exactly, boarded a boat it need not have. That is the end of it." *Magnesium Casting Co. v. Hoban,* 401 F.2d 516, 518 (C.A. 1, 1968), cert. denied, ___ U.S. ___, 70 LRRM 2344.

To the extent that the Company here attempts to renew the challenge to the *Excelsior* rule as an improper exercise of the Board's recognized discretion to control representation elections, its contention must also fail. All courts that have ruled on the validity of the *Excelsior* rule have

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15a All other Courts of Appeals which have ruled on this point have disagreed with the First Circuit. *Groendyke Transport v. Davis,* ___ F.2d ___ (C.A. 5, 1969), 70 LRRM 2268, 2272; *British Auto Parts v. N.L.R.B.,* F.2d ___ (C.A. 9, 1968), 70 LRRM 2065; *N.L.R.B. v. Beech-Nut Life Savers,* ___ F.2d ___ (C.A. 2, 1968) 69 LRRM 2846; *Howell Refining Co. v. N.L.R.B.,* 400 F.2d 213, 216, n. 8 (C.A. 5, 1968).

16 Section 10(e) provides, in relevant part, that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

approved it. See cases cited *supra; N.L.R.B. v. Rohlen,* 385 F.2d 52 (C.A. 7, 1967); *N.L.R.B. v. Hanes Hosiery Div., Hanes Corp.,* 384 F.2d 188 (C.A. 4, 1967), cert. denied, 390 U.S. 950 (1968). And the First Circuit strongly implied its approval of the substance of the rule. *Wyman-Gordon Co., supra,* 397 F.2d at 399. In short, as the Board demonstrated in *Excelsior, supra,* and as the court opinions cited above conclude, the *Excelsior* rule serves the valid dual purpose of giving employees a chance to hear both sides of the election campaign and of reducing the number of challenges to votes cast, thus increasing the chances for a fair election. The Company's challenge to the election on this basis should therefore be summarily rejected.

## II. THE BOARD'S ORDER IS REASONABLE AND PROPER

The Board ordered the Company to cease and desist from refusing to bargain with the Union as the exclusive bargaining representative of the employees in an appropriate unit and from interfering in any like or related manner with the employees in the exercise of their Section 7 rights. Affirmatively, the Board ordered the Company to bargain with the Union upon request and to post appropriate notices (J.A. 170-171, 160-161). The Union argues that the Board's order is insufficient "to restore the *status quo ante* without the additional relief requested by the IBEW (U. Br. 10); the Company concedes that the order is proper if the unfair labor practice proceeding is proper (Co. Br. 10, 26).

The Union, while noting that the Board's aim in framing remedies is to restore the situation "as nearly as possible to that which would have obtained but for the unfair labor practices," *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177 (1941), omits mention of the critical standard that the Board's order may not be disturbed "unless it can be shown that the order is a

patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). Moreover, as this Court has recognized, the standard of review remains the same whether the party challenges the order on the grounds that his rights were infringed by the Board's *refusal* to order a remedy, or on the ground that the remedy is in excess of its discretionary powers.

> The Board's power to fashion remedies places a premium upon agency expertise and experience, and the broad discretion involved is for the agency and not for the court to exercise. We cannot insist that the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law.

*Amalgamated Clothing Workers v. N.L.R.B. (Hamburg Shirt)*, 125 U.S. App. D.C. 275, 281, 371 F.2d 740 (1966). See also, *United Steelworkers v. N.L.R.B. (Northwest Engineering)*, 126 U.S. App. D.C. 215, 218, 376 F.2d 770 (1967), cert. denied, 389 U.S. 932; *Retail, Wholesale & Dept. Store Workers Union v. N.L.R.B.*, 128 U.S. App. D.C. 41, 48, 385 F.2d 301 (1967).

Measured by these standards, the Union's argument here must fail. At no point has it demonstrated that the traditional relief here ordered – bargaining on request with the Union – will be ineffective as a matter of law. Initially, the Company's conduct here complained of is solely its refusal to bargain without first seeking court review of the Board's underlying certification in the only manner available to it under the statute. See *Retail, Wholesale Workers v. N.L.R.B., supra.* Unlike cases cited by the Union (U. Br. 16-18) where employer unfair labor practices were found to have undermined the employees' confidence in the union by flagrant violations of the Act, the Company here has violated the Act only in a

"technical" sense. In the cases cited by the Union, the additional relief ordered – *e.g.*, mailing list, access to parking lots, access to bulletin boards, reading of notices – were all based on record showings of specific unfair practices which tended to intimidate employees or prohibit communication between employees and the Union.

Thus, in *H.W. Elson Bottling Co.*, 155 NLRB 714 (1965), enf'd with modifications 379 F.2d 223 (C.A. 6, 1967), the requirement that the cease and desist notice be mailed individually to employees was predicated on a showing that employees had been individually interrogated; and the provisions in the Board's order for access to bulletin boards and a 1-hour meeting on Company property were predicated on the substantial showing of unusual interference with communication between the union and the employees. Moreover, the Sixth Circuit there deleted the requirement that the Company open its doors for a 1-hour meeting, because the unfair labor practices there found were not sufficiently flagrant to justify such a drastic invasion of the employer's property. 379 F.2d at 226-227. In contrast, the relatively minor unfair labor practices the Board found Presto committed in another case, a year prior to the refusal to bargain here – interrogating a single employee as to where he had obtained union cards, telling employees the plant could move if a union entered the plant and threatening one employee with discharge – do not necessitate a large scale remedial order to reinstate the *status quo.*

In short, we submit that this case is squarely in point with *Retail Wholesale and Dept. Store Workers v. N.L.R.B., supra,* where this Court found that the circumstances "did not serve as an appropriate vehicle for the creation of unprecedented remedies." As in that case, judicial review of the underlying representation proceedings could be obtained by the Company only through this proceeding, and no evidence has been presented which suggests that the Company sought review here only for purposes of delay.

## CONCLUSION

For the foregoing reasons, the petitions to review filed by the Union and the Company should be denied, and an order should enter enforcing the Board's order in full.

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February 1969.

IN THE

# United States Court of Appeals

## FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 22,051**

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**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Petitioner**

**versus**

**NATIONAL LABOR RELATIONS BOARD, Respondent**
**PRESTO MANUFACTURING COMPANY, Intervenor**

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**No. 22,313**

---

**PRESTO MANUFACTURING COMPANY, Petitioner**

**versus**

**NATIONAL LABOR RELATIONS BOARD, Respondent**

---

**REPLY BRIEF FOR PETITIONER IN CASE NO. 22,313**

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# REPLY BRIEF FOR PETITIONER IN CASE No. 22,313

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## STATEMENT OF THE ISSUES PRESENTED BY THIS BRIEF

Presto Manufacturing Company (herein called Presto) filed its brief in this consolidated proceeding on

December 6, 1968. On February 5, 1969, the Board filed its brief.

In its brief the Board argued the various objections presented to the Court for review individually, without considering the cumulative effect upon the employees of the various misrepresentations by the Union. It contended that the objections, viewed singly, did not have the effect of interfering with the employees' choice in the election. Nor did the Board, in its brief, consider the background circumstances within which the misrepresentations occurred so that an objective evaluation within such circumstances could be made. It made inferences of fact relating to the intention of the Union, in its representations to employees and their effect upon employees, which, in the absence of a hearing, are without record support.

## SUMMARY OF ARGUMENT

The Board erred in its Regional Director's decision, as well as in the position taken in its brief, by considering each of the various objectionable acts committed by the Union in isolation and ignoring the campaign as a whole within its full contextual environment.

The Board did not afford the employer a hearing in which to develop the full facts surrounding the misrepresentations made by the Union. Therefore, no resolution of controverted fact was made. Accordingly, its factual contentions relating the motivation of the Union and its contentions as to the fact of employee response to misrepresentations are properly to be

viewed as *issues* of fact rather than *proven* fact where unsupported by the record. The Board's brief creates issues of fact which themselves demonstrate the Regional Director's error in failing to provide a hearing.

When evaluated within proper legal criteria, the objectionable conduct upon which Presto relies in seeking to set aside the election is shown to be substantial. The election was *not* held free of interference with the laboratory conditions required by Board election rules.

## ARGUMENT

"It is not the effect of any one of the objectionable acts standing alone, however, but the combined effect of all of them, which must be considered." *Hometown Foods, Inc. v. NLRB*, 379 F.2d, 241, 244 (5th Cir. 1967). See also *Howell Refining Co. v. NLRB*, 400 F.2d 213, 218. Nor can the objectionable conduct, even viewed cumulatively, be evaluated in a vacuum. Each election situation is unique. Environmental factors, not themselves a part of the objectionable conduct, influence employees and contribute to the attitude with which misrepresentation will be received. In speaking to this point, the Fifth Circuit, in *NLRB v. Smith Industries, Inc.*, 403 F.2d. 889, 895 (1968), stated as follows:

> However, the problem in these representation proceedings is that we are dealing with the elusive concept of the subjective effect of objective union conduct on "the minds of the voters", and subjective as well as objective evidence may be sufficient to overturn the

> election. See Hometown Foods, Inc. v. NLRB, 5th Cir. 1967, 379 F.2d 241, 244. An evaluation of the historic facts, *without an inquiry into the surrounding circumstances,* without viewing those facts cumulatively, and without an opportunity to directly observe and examine witnesses may lead to erroneous legal conclusions. (Emphasis supplied).

It is through the commission of the errors described by the Court in the above cited cases that the election was erroneously held to be valid by the Regional Director of the Board. The same approach was utilized by the Board in its brief to this Court.

A proper evaluation of the effect of the Union's misrepresentations therefore requires consideration of all the attendant circumstances. As pointed out in the Union's brief, this was not the first election in Presto's Jackson plant involving this Union. In 1966 there had been an election in which the Union received 330 votes, an intervening labor organization had received 7 votes, and 340 employees had voted against union representation. This election was the subject of objections by the Union. Its objections were combined with a hearing on unfair labor practice charges filed by the Union. This proceeding resulted in exoneration of Presto with respect to all charges save for three instances in which lowest echelon supervisors made comments which were found to be violative of Section 8(a)(1) of the Act. *Presto Manufacturing Company,* 168 NLRB No. 144, 67 LRRM 1173. Since only two of these incidents occurred prior to the election, it is unlikely that, in a

unit of almost 700 employees, the Board could have found that they constituted grounds for setting aside the election. Such conduct, standing isolate and insubstantial, could not reasonably be interpreted to have affected the outcome of the election. *NLRB v. Blades Mfg. Co.*, 344 F.2d 998 (8th Cir., 1965); *West Texas Equipment Co.*, 142 NLRB 1393.

Before the Trial Examiner could issue his decision, however, which would vindicate the company of objectionable conduct during the election campaign, the Union withdrew its objections to the first election, and filed the petition which resulted in the election presently at issue. Presto objected to the direction of a new election without the opportunity to vindicate itself in the eyes of its employees, without the opportunity to make improvements in its employees' wages, hours and working conditions free of a pending organizational campaign without the prospect of committing an unfair labor practice.[1] (App. 45)[2] Presto's request for the opportunity to vindicate itself was denied by the Board in the prior case and the situation was not permitted as a basis for dismissal of the instant case by the Regional Director of the Board. (App. 2, 18).

Thus Presto began the new organizational campaign under a dual cloud which placed it at a disadvantage

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[1]The granting of improvements in employee benefits beyond routine wage increases would likely result in a finding that such improvements were for the purpose of and were reasonably calculated to improperly impinge on employee choice in any new election which might be ordered. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 11 L.Ed. 2d 435, 84 S.Ct. 457.

[2]All references herein are to the Appendix of the Parties.

with its employees. It had been accused of interfering with its employees' rights, but denied the opportunity to demonstrate to its employees that it was innocent of the charges. Most importantly, it had been denied the opportunity to give benefits to its employees which it would have given and to which they were entitled. The essential ingredients which engender employee satisfaction — trust in his employer's fair treatment and adequate job benefits — were absent from the very beginning of the new election campaign. Presto could do nothing about this situation for which it was not responsible. Both aspects of Presto's dual disadvantage were repeatedly utilized by the Union in its campaign material. Thus, in seven separate leaflets, the Union taunted Presto with the fact that its wage increase in 1967 (a raise which was the result of averaging prior increases) was inadequate under the circumstances. (App. 80, 87, 88, 90, 91, 95 and 99). This tactic could not be met by Presto without facing another unfair labor practice charge alleging either the unlawful withholding of wage increases during an election campaign or the unlawful promise of one. The fourteen month delay incident to the first election and its consequent effect on employee benefits are essential aspects of the background within which the effect of misrepresentations concerning employee benefits must be evaluated. Dormant employee feelings about the inadequacy of a wage increase, brought to life and turned into resentment against the employer by the Union's repetitive propaganda, provide a ready receptacle for the receipt of representations concerning employer's denial of other benefits.

But the major injury perpetrated by the Union during the campaign was to Presto's credibility, its integrity — indeed, its honesty — in the eyes of its employees. This was a direct result of the representation by the Union that Presto was dealing with the Board behind the backs of the employees, and the Regional Director's treatment of Presto's request that he remedy the situation.

The Board attempts to minimize this situation by treating the Union's leaflet as (1) simply a response to a company leaflet, (2) as restricted only to the timing of the election, (3) and as offering sufficient time for rebuttal prior to the election.

The company leaflet was an announcement solely of the fact of a scheduled election. All Board elections are arranged with that governmental agency. Presto "claimed" nothing. Nor did it admit to any wrongdoing by "arranging" for an election while its employees were on vacation. The Union's assertion was that it proved a charge which the Union had made "time after time" of connivance between the company and the government. The accusation goes beyond any professed answer to a company statement. By its terms it states that the company leaflet admits to a *pattern* of double dealing. The Board's interpretation is not justified in the text of the handbill. There is *no reference* in the handbill to a company refusal to agree to a consent election or to the Board's extension of time to file briefs. *If* that had been the Union's intention, *if* there had been a hearing on the objections, and *if* the author had credibly so testified on examination and cross-

examination, the Board could appropriately argue that interpretation. In the absence of record evidence, the Board must be bound by the literal terms of the leaflet itself.

Whether or not a company reply to the leaflet would have been effective if it had chosen that alternative rather than appealing to the Board is not the issue. In fact, it appealed to the Board, as the other party whom the Union had stated was improperly dealing behind the backs of the employees. The Regional Director's reply destroyed any hope of an effective rebuttal to the Union's leaflet by Presto. The treatment of the company letter as a prohibited *ex parte* communication was itself an accusation of improper contact with the Board. How effective could a company reply be in these circumstances? Any effort to meet the Union's prior claim would be with the foreknowledge that the Union could *prove* that the Regional Director *agreed,* in at least one instance, with the Union's characterization of the company. *Any* effort to dissipate the effects of the Union leaflet would only exacerbate its effects.

The Acting Regional Director agreed, in his decision, with the interpretation of the Board's Rules and Regulations of the Regional Director. (App. 10). Despite requests by Presto in its Request for Review (App. 108) and in its Motion for Reconsideration (121-123), that the Board rule upon this interpretation of Section 102.126, 102.128(a), and 102.129(a), the Board refused to do so. (App. 120, 125). In its brief (p. 13), the Board takes the surprising position that subsections (a) and (b) "merely define the point in time when a

representation proceeding becomes 'on the record' and, out of considerations of fairness, *ex parte* communications are *thereafter prohibited until the case is closed.*" (Emphasis supplied). Accordingly, the Board reasons, the Regional Director's service of the letter was proper under the Board's rules and cannot serve as a basis for setting the election aside.

If this be a correct interpretation, then each and every regional office of the Board daily participates in violations of the requirements of this section. Using the present case for illustration, the entire investigation by the regional office was handled *ex parte*. Presto sent letters to the Regional Director, who of necessity participated in the initial Decision and Direction of Election and in the Supplemental Decision and Certification, the findings of which are here at issue. Evidence was furnished *ex parte* to a Board investigator who had to have participated in the Supplemental Decision or there would have been no information upon which the Supplemental Decision could be grounded. It is assumed that the Union also gave evidence or communicated its position on the objections to the Regional Director, but such communication was never served on Presto in accordance with Section 102.133.

If that be the correct construction of the proscribed *ex parte* communications sections, such fact would not prevent consideration of the Regional Director's action as contributing to the foundation of meritorious objections. His selection of but one *ex parte* communication, out of many in the case, to be treated as prohibited is beyond any discretion reposed in him by the

Rules. If he elected to waive the requirements of these Rules as to other communications, similarly prohibited, his selection of this communication as the only one for which the Rules were involved was, under the circumstances of this case, improper.

The situation in which the company then stood affords the context within which the effect of the misrepresentations concerning its pension and insurance plans can be meaningfully understood.

The Union represented that Presto had no pension plan on August 7. (App. 93). The same day Presto issued a handbill which listed "protection for your old age" as one of a number of benefits the employees enjoyed. On the day preceding the election the Union reiterated its representation that there was no such plain. In *ordinary circumstances* such representation might be evaluated by employees simply as propaganda if evaluated within proper perspective.

Here, however, the statement was by that organization which had *exposed* the company for its prior double dealing — an "exposure" to which the Regional Director has given quasi-official credence. Many employees might, and reasonably so, believe that Presto had again been exposed, this time for a claimed pension plan which it did not have. In a hearing Presto could show that its Jackson operations had not been in existence for a sufficiently long period that there would be recipients of benefits under the plan, that a substantial number of employees were hired since the initial announcement of its pension plan, and other

factors showing that the employees lacked independent information upon which to evaluate the Union's misrepresentation. Thus, they must choose between the credibility of the "guilty" employer and that of the organization which first showed them the guilt.

The Board contends that the Union's misrepresentations concerning the pension plan were for the purpose of forcing the company to disclose the terms of the pension plan to the employees. (Board's brief, p. 15). Since the Union's position and the intention of its various handbills are not in the records, the Board relies exclusively on a previous handbill. The Board apparently contends that Presto cannot complain because it did not respond to the Union's challenge:

> "Do you contend that you are going to give them an Improved Pension Plan if they vote the Union out??? IF SO, PUT IT IN WRITING." (Ex. 24, App. 88)

The Board knows that there can be no answer to such a challenge. If Presto, in writing or otherwise, promised an improvement in the pension plan conditioned upon the rejection of the union, it would violate Section 8(a)(1) of the Act. Conversely, a negative reply would insure victory for the union in the election. The only relevance which this handbill has to the issue is that it proves the Union had knowledge of the pension plan and *willfully* misrepresented that it did not exist.

The Board further claims that the Union's references to the insurance were for the purposes of seek-

ing employee investigation of the insurance plan. The Board completely miscomprehends the real nature of this misrepresentation. The Union sought to convince employees that a named employee *still owed* that which, in fact, was *the entire medical expense*. Employees could only believe, considering the union's apparently *exact* figures, that any maternity claim would equal more than three hundred dollars *after payment of the insurance amount*.

The company did not have the claim for the doctor's bill at the time the leaflet was distributed. (App. 42). If it had had the facts it could have *effectively* replied by stating the actual amounts paid. It might show to the employees — most of whom do not utilize *private* rooms and television during confinement — that a substantial part of the costs were those which most employees would not incur. Given sufficient time, the company might show that insurance plans under the Union's contracts do not provide coverage for such hospital luxuries. Without either information or time, the company was helpless to do any of these things.

The Union's ploy — invitation to employees to ask the named employee about it — was effective in casting an aura of authenticity to its misrepresentation. But it did not, as claimed by the Board, operate to permit employees to check the facts and judge for themselves. Over six hundred widely dispersed employees would have slight chance, during the course of the *one* day remaining until the election, to discuss in detail with the named employee his insurance experience.

The last assertion by the Union, apparently based on its experience as a representative of employees, in its context is that there would be a better plan if the company were paying its share of the cost of insurance. Therefore, it followed that the company was not paying its share ". . . (A) misrepresentation by one in fact having no knowledge at all would be effective if he was thought to be credible." *NLRB v. A. G. Pollard Company*, 393 F.2d 239, 242 (First Cir. 1968). So the company, dealing with the government behind the backs of its employees, claiming a pension plan it did not have, and depriving employees of an adequate pay increase, was now shown to be cheating on its payments to the insurance plan.

All of the above misrepresentations involve, directly or indirectly, the employer's refusal to give money to employees and to provide benefits which cost money. On the day of the election, the Union told the employees where that money went — to a "Union Buster".

Looking at the leaflet through eyes of a lawyer or a court, it might reasonably be argued that the leaflet does not contend that such label was affixed to Robey by the "U.S. Labor Department". But the leaflet must be evaluated through the eyes of employees. The Union, expert in this field, defined the term "outside labor consultant" as meaning "union buster". While the figures shown do not indicate that any of the funds were paid *by* the Jackson plant, this fact, contrary to the Board's contention, does not afford employees the basis for evaluating the handbill. The handbill can only be understood in terms that Presto withheld its em-

ployees' legitimate wage increases in order to give them to a "Union Buster" to keep the Union out of the Jackson plant.

Attempts by the Board to diminish the effect of these last-minute representations by the Union cannot overcome the crucial timing of these handbills by the Union nor their deliberate distortion. "One must regard deliberateness as an admission that the matter was important. No one is in a better position than the Union to know what the voters need to be told." *NLRB v. Francoa Chemical Corporation,* 303 F.2d 456, 461 (1st Cir. 1962).

## CONCLUSION

For the reasons set forth above, as well as those set forth in Presto's main brief, we submit that a decree should issue denying enforcement of the Board's order.

Respectfully submitted this 5th day of March, 1969.

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**CERTIFICATE**

The undersigned certifies that one copy each of Reply Brief for Petitioner, Presto Manufacturing Company, has this day been served by certified air mail upon the following counsel at the addresses listed below:

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